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ABSTRACT

The Legal Problems in Higher Education seminar had as an objective to help the student who may become a college administrator or a college teacher to develop a sensitivity to any situation that potentially could become a legal matter and perhaps result in a court case. The seminar papers are arranged in 3 clusters: students, faculty, and institutions. In the first section the writers recommend that colleges should develop and communicate to students, before a crisis develops, a code of student conduct and related disciplinary procedures. Fifth and Fourteenth Amendment rights and procedural due process are also discussed. The section concerning faculty legal programs contains papers on collective bargaining, academic freedom, tenure, and contracts. Affirmative action programs from a legal perspective are discussed in the third section, along with accreditation and state control. Appendices contain a selected annotated bibliography on legal problems in higher education. (Author/PG)

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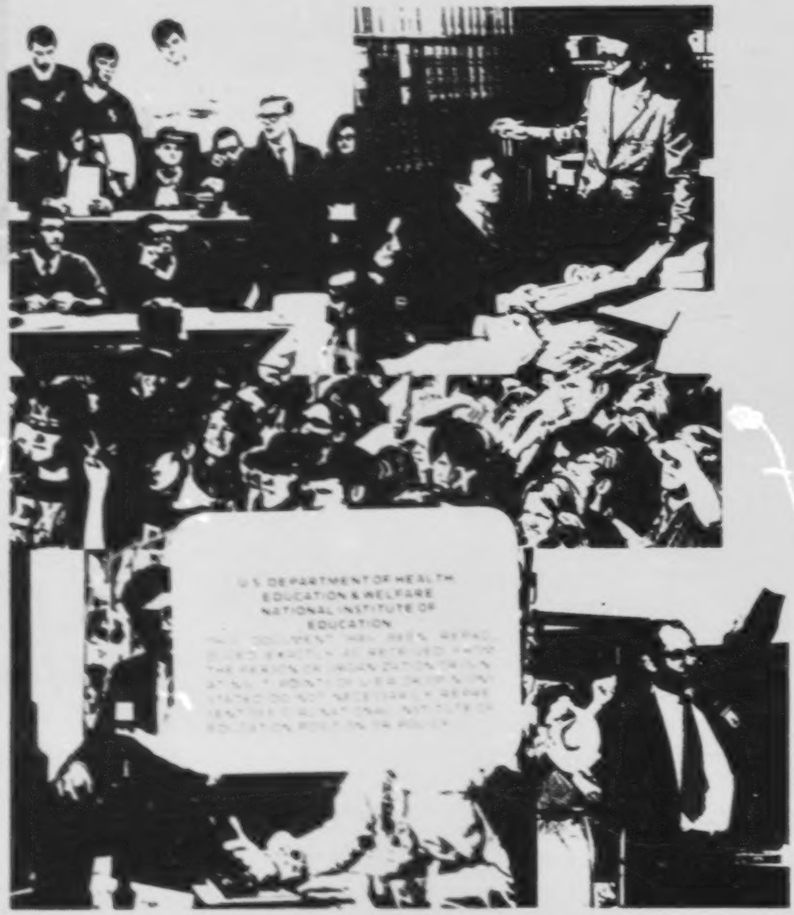
LEGAL PROBLEMS IN HIGHER EDUCATION



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Legal Problems in Higher Education

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TABLE OF CONTENTS

Page

FOREWORD—Collins W. Burnett iii

INTRODUCTION—W. L. Matthews vii

STUDENT PROTEST, DEMONSTRATION, AND VIOLENCE—Jack Hall and Harry Beck 1

CODES OF STUDENT BEHAVIOR—Jack Hall and Stanley Blostein 10

DUE PROCESS IN HIGHER EDUCATION—Robert Clement and Robert Moore 19

ACADEMIC FREEDOM AND TENURE—Marizu Richardson and Kenneth Bean 27

COLLECTIVE BARGAINING—Robert Clement and Billy Melton 37

FACULTY CONTRACTS—Stanley Blostein 48

AFFIRMATIVE ACTION PROGRAMS: EXPLANATION AND IMPLICATIONS FOR HIGHER EDUCATION FROM THE LEGAL PERSPECTIVE—Janet Hilliker Portig and Barbara Genelle Smith 53

ACCREDITATION IN HIGHER EDUCATION—Saundra Lykins and Shannon Craig 67

STATE CONTROL OF HIGHER EDUCATION—Anna Johnson and Jane Kalb 84

APPENDIX A—A SELECTED AND ANNOTATED BIBLIOGRAPHY ON LEGAL PROBLEMS IN HIGHER EDUCATION—Robert Payne Koven 97

APPENDIX B 114

ABOUT THE AUTHORS 116

FOREWORD

Determining that there was a need to develop the seminar, Legal Problems in Higher Education, for majors in the graduate programs of the Department of Higher Education, was rather easy, but deciding how to organize and implement the idea was an effort that extended over nearly a year. Involved in this effort were the development of a close personal relationship between the two instructors, a survey of similar courses or seminars at other universities, a compilation of an excellent annotated bibliography, an equally valuable cross indexed file of legal references, and a format for the seminar.

Professor Matthews of the College of Law, University of Kentucky, develops very well the rationale and major concerns of the seminar in the Introduction. We knew from our survey of selected universities with doctoral programs in Higher Education that a course or seminar concerned with legal problems in higher education was not a new idea. What was unique, however, was the fact that a Professor of Law and a Professor of Higher Education planned and taught the seminar as a team. Such an interdisciplinary relationship is not created by administrative fiat but rather is developed by two people who have accepted each other at a high level of confidence.

The major objective of the seminar was to help the student who, in most cases, will become a college administrator or a college teacher to develop a sensitivity to any problem or situation which potentially could become a legal matter and perhaps result in a court case. In such an instance, the person functioning in the college environment would hear the alarm bell ring and go at once to seek legal counsel before the problem became a court case. The intent was not to help the student become a journeyman attorney or "sea lawyer."

Each set of students was responsible for developing an oral presentation to the seminar and a paper for each of two topics. Not all of the papers are included here due to the limitation of space or other reasons. Those that are presented represent quality consideration of topics which are relevant and important to college teachers and administrators and to students of the phenomena and developments in Higher Education which is becoming a specialized, scholarly area.

It was an editorial decision to arrange these papers in three clusters: students, faculty, and institutions. There are three papers in the first cluster which concern students. Jack Hall and Harry Beck, who have had considerable experience in professional college student personnel, emphasize in "Student Protest, Demonstration, and Violence" that student unrest occurred at various times prior to 1964, the Berkeley Revolution. Various social and economic factors seem to be a part of these crucial periods. The writers focus on the First Amendment to the Constitution which guarantees free speech and assembly. The concept of clear and present danger and the tenuous line between the right of students to meet and discuss as opposed to disrupting or interferring with the educational function of the college are discussed. The writers recommend that the college should develop and communicate to students, before some crisis develops, a code of student conduct with related disciplinary procedures.

In "Codes of Student Behavior" Jack Hall and Stanley Blostein present a brief historical background of American higher education to indicate that we entered a new era of student behavior with the student violence and activism of the 1960's. Out of this concern about students, institutions have developed codes of student behavior.

Robert Clement and Robert Moore in "Due Process in Higher Education" discuss some of the major facets of this concept in the Fifth and Fourteenth Amendments to the Constitution. Both procedural and substantive due process are discussed within recent court interpretations.

The next three papers discuss legal problems in relation to faculty. Marizu Richardson and Kenneth Bean deal with two concepts which traditionally are at the top of the list in faculty concerns, viz., academic freedom and faculty tenure. The leadership of AAUP dominates the literature in this area.

Robert Clement and Billy Melton write about "Collective Bargaining" which is emerging as one of the major faculty concerns of this decade. Because of budget restrictions and fewer chances for faculty to move to better positions at other universities, more teachers in two-year and four-year institutions are considering the advantages of collective bargaining to improve their professional status on their own campuses.

Stanley Blostein in "Faculty Contracts" discusses contracts as an alternative to tenure and as the final stage of collective bargaining. Due to the budgetary press which faces higher education, some college administrators are confronted with the prospect of dismissing tenured faculty and even suspending tenure in favor of a contract plan. Within this press, faculty may decide to champion a contract negotiated through collective bargaining.

The next cluster of three papers presents an institutional focus. Barbara Smith and Janet Portig discuss affirmative action programs from a legal perspective. Needless to say, most college administrators and faculty approve philosophically the belief that women and members of other minority groups deserve equal consideration for employment. On the other hand, unless the instiution has some overt reason to reinforce this belief and translate it into an action program very little change occurs.

Saundra Lykins and Shannon Craig in "Accreditation in Higher Education" deal with another topic which until recently was a practice taken for granted. Some major court cases during the last ten years and the recommendations of the Carnegie Commission on Higher Education and the Report on Higher Education by Frank Newman and his committee have moved accreditation into the controversial area.

Anna Johnson and Jane Kalb in "State Control of Higher Education" present the historical background and recent developments to indicate that both the federal and state governments, and especially the latter, have become control factors for public higher education. As traditional distinctions bewteen public and private higher education become less sharp, probably the private sector will come more and more under these same controls or coordination.

Robert Koven with an undergraduate major in political science and a basic understanding of the field of higher education presents in Appendix A one of the finest annotated bibliographies in the literature. It is not definitive but it is selective, comprehensive, and excellent.

Finally, acknowledgments are due many persons. Vice President Cochran allocated funds to finance the work of the annotated bibliography and the file of legal references. Professor Matthews with his specialized knowledge, interest in the students in the seminar, and his willingness to work with a professor in another college, contributed a great deal to a successful venture. The students who wrote these papers were not only pleased to have them published but also contributed additional time to the editing process. Both assistant editors, Kathleen Harris and Ann Major, deserve much credit for their English major background expertise and cooperation. Mrs. Harris was most helpful in checking references and in reinforcing the editor. Sharon Marcum, who typed the revised manuscripts and was helpful with some of the editing as well as the typing, deserves special thanks.

Collins W. Burnett
Professor of Higher Education
University of Kentucky

INTRODUCTION

The following articles treating selected legal problems in higher education were written initially as discussion papers for a graduate seminar in the Department of Higher and Adult Education of the University of Kentucky, during the spring of 1973. Professor Collins W. Burnett, the Department Chairman, and I taught the seminar as something of an experimental enterprise, because it was a first time effort for us and for the students as well. Since the articles reflect generally the contextual purpose for which they were written, it may aid those who read them to have some descriptive comment about the seminar.

Professor Burnett conceived the idea of giving the department candidates for advanced degrees a structured opportunity to examine legal problems in higher education. Very early, and well before any procedural prejudgments were made, he talked at some length with me. In the ensuing year and a half of preparation and implementation, everything that occurred in pursuit of the idea involved our mutual judgment, formed through full discussion and exchange of thoughts.

This close intellectual and administrative collaboration obviously was not a unique planning or operational technique, but it had strong influence on the seminar design. Indeed, as it turned out, the seminar was so much a blend of our "educational" and "legal" minds working together that it clearly affected the perspectives of the students and what they have written in their articles. For instance, the problems or topics selected for discussion were neither entirely legal nor educational, and the articles as a whole do not adopt such a classification, either in their titles or in the substantive issues which they address. This explains also why the documentation in the articles runs both to the educational literature and to the legal literature, and even why in some instances essentially legal questions are documented to legal journals and to cases and statutes.

Beyond this conscious mixing of things legal and things educational, there were other characteristics of the seminar which resulted from the collaborations of the particular instructors and which are reflected in the articles. These came from our common professional background and experience as teachers and administrators, rather than our different backgrounds of specialty interest and professional education.

We had no difficulty at all in agreeing that the seminar should provide primarily an opportunity to learn through study and discussion rather than through original research. Empirical analysis of the problems was not expected, and the analysis of legal doctrine focused on problem identification and definition, rather than on an exhaustive or definitive synthesis of legal authority. Thus, the articles discuss how one may knowledgeably perceive selected issues and questions which many institutions face currently, rather than specific and authoritative proposals for the resolution of them.

Despite our different experience roles in the processes of institutional administration, Professor Burnett and I believe that it is superficial to classify legal problems in higher education rigidly in terms of the traditional tripartite groups: students, faculty and administration. We encouraged participants in the seminar discussions to think of the problems as institutionally based rather than as lying solely in a student, faculty, or administrative realm. Again, this view is rather consistently reflected in the articles, and one will not find in them excessive pre-occupation with legal problems of the internal sub-communities in higher education.

Still another characteristic of the seminar, which shows through in the articles, derived from the view that meaningful and clear distinctions between legal issues and policy issues are hard to come by in the administration and governance of most educational institutions these days. Two quite basic questions were raised repeatedly in the discussion sessions of the seminar, running to nearly all of the old and new legal problems facing higher education: (1) can an institution function successfully to its desired goals by confining its policies, or policy choices, to those that are predictably "legal"?, and (2) if not, when and how should policy override legality and what are the measurable risks? To pose both questions is to invite a great range of difficult value judgments, whether such judgments are fully rationalized beyond ones own value system or not. Thus these articles are rather heavily value judgment oriented, at least in terms of the author's own value system.

Finally, the seminar was characterized by the mutual view of the instructors that legal problems in higher education do have a history and that some understanding of the historical development of American higher education as such is helpful in resolving these problems however immediate or prospective they may seem to be, especially when first encountered. A more than passing concern for the history of the problem and for the history of the institutionalized setting in which it occurs is present in all of the articles and gives them a dimension not found in everything one reads in this field.

It would be entirely inaccurate to leave those who may read the articles with the impression that all of the characteristics of the seminar were traceable to the influence of the instructors. The student participants themselves contributed greatly to what the seminar turned out to be. In addition to their uniformly high intelligence and well developed discussion and writing skills, they brought to bear on this experimental enterprise a very refreshing enthusiasm, and a particular willingness to address the problems with an open mind. Legal problems in higher education are not easy problems to understand or to resolve. More often than not they are problems which polarize viewpoints within the community in which they occur, and engender bitter debate in the outside community as well. In nearly all cases, the problems discussed in this seminar and treated in these articles are composed of complex issues and questions to which there is no simplistic answer. In one of the true senses of learning, one must first lay aside his pre-conceptions, biases, and fixed notions in order to come to grips with these problems. The students made this happen in this seminar and the articles they have written reflect an openness of analysis and an absence of narrow conclusions that make them informative to read.

Also, the articles as a whole reflect a very considerable level of experience on the part of the authors in the day to day and on going operation of a variety of institutions of higher education. In the main the student members of this seminar were functioning simultaneously as teachers, administrative officers, staff and research personnel in a good range of different kinds of colleges and universities. Their educational backgrounds and specialty career interests were diverse, but they all had the common advantage of knowing something about the defacto methods and means with which some particular college or university had attempted to solve its legal problems. Thus, they have written about their topics not only with a theoretical overview, but also with some understanding of the practical and pragmatic responsibilities that fall on every institutional office in higher education today.

Not unlike the review of a good book or play, this introduction is no substitute for the real thing, so I commend this series of articles to your full reading.

W. L. Matthews, Jr.
Professor of Law
University of Kentucky

STUDENT PROTEST, DEMONSTRATION, AND VIOLENCE

by

Jack B. Hall and Harry L. Beck

No single phenomenon has been more unsettling to the academic community in recent years than the widespread occurrence of mass student demonstrations and protests. These protests stemmed from a variety of either real or imagined wrongs, from the quality of food in the cafeteria to the war in Vietnam. Protest activities are not new, nor are they indigenous to the United States. As Wilson (1970) pointed out, the contemporary student movement is worldwide. It has taken place in New York, Madrid, Rome, Cambridge, Tokyo, and Warsaw. Students seem to be rebelling against a stifling bureaucratic mass system, one which leaves them powerless and is unresponsive to their needs and desires.

Wilson (1970) emphasized that student rebellions and demonstrations are by no means unique to the decade of the sixties or even to the 20th century. Between the years 1800 and 1875, students revolted at least on one occasion at Miami University, Amherst, Brown, University of South Carolina, Williams, Georgetown, University of North Carolina, Harvard, Yale, Dartmouth, Lafayette, City College of New York, Dickenson, DePaul, Princeton, and others. For instance, in the commons room of a dormitory at South Carolina College in 1833, two students reached for a plate of trout at the same moment; only one survived the ensuing duel. Other early American victims of campus violence included a professor who was killed at the University of Virginia, the president of Oakland College in Mississippi who was stabbed to death by a student, the president and a professor who were stoned at the University of Georgia, and the students who were murdered at the University of Missouri and the University of North Carolina.

A newspaper headline, "Students Here Riot at Peace Rallies," did not appear in yesterday's paper but, according to Mangano and Casebeer (1971), was a front page story in an April, 1934, issue of the *New York Times*. There are a number of parallels between the two most recent periods of student anti-war activism, the thirties and the sixties. Economically the two periods were unstable. Depression engulfed the country in the thirties, whereas runaway inflation was characteristic of the sixties. Mangano and Casebeer (1971) discussed several 1930 studies which show a correlation of social attitudes between today's student and the student of the thirties. In the instances cited, students were found to hold liberal views on the issues of birth control, social progress, freedom of speech, war, communism, and pacifism. Students of both periods disapproved of United States involvement in any war and were against compulsory military training and the draft.

Activist students of the 1930's, like their parallels in the 1960's, organized to promote their causes. The American Student Union, an outgrowth of the merger of the National Student League and the Student League for Industrial Democracy, was formed in 1935 to promote student education on campus, community, and world issues. By 1938 the ASU had 225 chapters across the nation. At the same time the United Student Peace Committee was established. These two groups were responsible for the Armistice Day strikes against war. The Students for a Democratic Society (SDS), a group which was founded in 1962, had social reform as its major goal. The group had an estimated membership of 35,000 to 40,000 and 250 to 300 chapters on American college campuses. After 1965, when interest in domestic issues such as civil rights was beginning to subside, the SDS focused attention on protest of the Vietnam conflict. Later, student organizations like the Vietnam Moratorium Committee led anti-war activities.

The dimensions of campus unrest were significant. In *Student Protest and the Law*, Holmes (1969) stated that the National Student Association listed 71 demonstrations as having occurred during the first two months of the 1967-68 academic year. Twenty-seven of these were protests against the presence of recruiters on campus representing the Dow Chemical Company, and three were movements against compulsory reserve officer training programs. This was just the beginning of the student protest movement that reached a climax during the 1969-70 academic year. The invasion of Cambodia in the spring of 1970 brought an avalanche of campus demonstrations. During this short period, over 300 major institutions reported campus demonstrations; a number of lives were lost; and the national guard appeared on numerous college campuses. In the summer of 1970, disgust with the era of discontentment on the campuses became apparent, and college officials concentrated on the First Amendment in an attempt to overcome campus disruptions and violence.

The First Amendment of the United States Constitution is relevant to student protests because it guarantees freedom of speech and assembly:

> Congress shall make no law respecting an establishment of religion or prohibiting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and petition the government for a redress of grievances.

O'Hara and Hill (1972) pointed out that since 1791 when the Bill of Rights was ratified the courts have been faced with interpreting the intent of the founding fathers in guaranteeing freedom of speech. These rights and the limits placed upon them to assure an equal balance of maximum liberty within the limits of restraint to insure an orderly society often raise delicate questions. One of the most significant interpretations of the Bill of Rights' protection of freedom of speech was made by Justice Oliver Wendell Holmes in the decision of *Schenck v. the United States*. The case is cited as the first clear-cut statement of the clear-and-present-danger test. The case involved the conviction of conspiracy to violate the

Espionage Act of June 15, 1917. Specifics included the obstruction of the recruiting and enlistment of men into the United States Military while the country was engaged in World War I. In particular, the defendants circulated anti-war material to draftees. The court affirmed the conviction of the defendants. In Justice Holmes' opinion, the character of an act depends on the circumstances under which it is done; the Constitution's protection of free speech cannot be extended to a man who causes panic by falsely reporting a fire. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree. Justice Holmes elaborated on this view in the case of ***Frohwerk v. the United States***, another case concerned with a conviction under the Espionage Act. The court stated that while the First Amendment prohibited legislation against free speech it obviously did not intend to grant immunity for every possible use of language. Although these decisions indicate that the courts formerly applied a strict standard affirming convictions when there was a threat of danger to public peace, in recent times the courts seem to uphold a conviction only when there is found to be a clear and immediate threat of public unrest.

Legal Decisions Concerning College Demonstrations

A most significant court decision on college demonstrations happened, appropriately, in Berkeley, California. The University of California campus in Berkeley was the scene of the country's first large-scale student disruption in the spring of 1964. This particular incident concerned the right of students to carry signs upon which they had painted obscene slogans. In this case, *Goldberg v. Regents of University of California,* the so-called free speech movement was struck down. The court's statement was as follows:

> An individual cannot escape from social constraint merely by asserting that he is engaged in a political talk or action. Reasonable restrictions on the freedoms of speech and assembly are recognized in relation to public agencies that have a valid interest in maintaining good order and proper decorum (Young, 1970, p. 38).

Despite the apparent precedence of this case, other courts continue to grope for a proper balance between freedom of expression and public order.

O'Hara and Hill (1972) reported that in the case of *Jones v. the State Board of Education,* students were suspended for "involvement in demonstrations and in the preparation and distribution of literature that was characterized as highly abusive to the University [of Tennessee] administration and disruptive to the University functions" (p. 93). The court attempted to determine whether the conduct sought to be regulated would disrupt the educational function of the institution and ruled that such conduct was a proper subject for university control. Nevertheless, subsequent cases have grappled with the problem of determining what conduct would tend to disrupt university functions as well as what activities constitute institutional functions.

The New York State Supreme Court in *Schryler v. the State University of New York at Albany* affirmed the long-standing principle that college and university officials have an inherent authority to maintain order on campus, to insure freedom of movement, and to discipline, suspend, and expel students whose conduct is disruptive. These officials may exercise this authority so long as there is an absence of arbitrary or capricious action on their part (Young, 1970).

A college rule prohibiting parades and demonstrations without prior approval of the college administration with the penalty for failure to comply being automatic expulsion was held void in *Hammond v. South Carolina State College*. Young (1970) reported that "the court held that such a rule was a prior restraint on the freedom of speech and assembly" (p. 34). It also "pointed out that a school did have the power to institute disciplinary proceedings against a student for lack of deportment and violation of other appropriate disciplinary regulations which may occur as a result [of a demonstration]" (p. 34).

One type of conduct that is clearly improper according to the courts is the occupation of buildings or the blocking of ingress and egress to college or university facilities. Students have the right to assemble at college or university buildings, but they have no right to exclude others from free movement in the area or buildings. O'Hara and Hill (1972) discussed some pertinent examples. The students at the University of Colorado protested job recruitment by the CIA and physically prevented entrance to the interview rooms on the campus. In this case, *Buttney v. Smiley*, the court ruled that free speech does not provide protection for conduct that disrupts the operation of the institution. The blocking of ingress and egress to a university's building clearly falls within this category. The court looked at the rights of persons desiring to enter the building and found that they should be protected. The persons preventing lawful access to the facilities were disciplined not for what they said but for what they did. In the case involving Grambling College, a group of students felt that collegiate athletics was overemphasized and occupied the administration building in protest. After an unsuccessful meeting with the president, several other buildings were occupied, and the normal functioning of the college was severely curtailed. Several students were expelled without notice and successfully appealed to the court. Upon rehearing, they were again suspended and once more appealed on the issue of free speech rather than due process in the hearing procedure. The issue was not whether the students had the right to criticize the institution's athletic policy, but whether the students could assert this right by occupying campus buildings and interfering with the operations of the institution. The court found that such conduct was well outside the protection of the First Amendment. These cases indicated that the court will not extend the protection of free speech to conduct which constitutes a breach of peace or interferes with the functions of the university.

Although the courts have been consistent in their affirmation that conduct which causes substantial disruption to university functions may render the participant subject to disciplinary action, the decisions have drawn a distinction between those who plan peaceful demonstrations which later become violent and those who specifically plan a violent demonstration. The case of *Scrogans v. Lincoln University* (O'Hara and Hill, 1972) concerned a demonstration to protest the cost and quality of food in the college cafeteria. In this instance the University had knowledge of the demonstration in advance and had issued a statement that any such activity must be peaceful and respectful of the rights of others. In this particular case, what had been planned as a peaceful demonstration resulted in $1500 worth of damage, and, as a result of damage, the institution suspended two students. The court found that no substantial evidence was apparent to support a finding that the students had planned a demonstration different from that which the University had previously authorized. This case provides a distinction between the right to plan and participate in an authorized demonstration and the university's right to discipline students for unlawful conduct, including planning and knowingly participating in a violent or disruptive demonstration. In order for these suspensions to have been affirmed, there must have been substantial evidence that those who planned and participated in the demonstration intended for it to be violent. In the "Peoples' Park" case at Berkeley (*Seigel v. Regents of University of California*), the court upheld the same rule of law but the case was decided against the student. O'Hara and Hill (1972) reported the court's findings as follows:

> Illegal conduct is not protected merely because it is in part initiated or carried out by language. Utterance in a context of violence involving a clear and present danger can lose its significance as an appeal to reason and become part of an instrument of force and, as such, is unprotected by the Constitution (p. 106).

In this case the court had found substantial evidence that the defendant had intentionally adopted an air of militancy in order to exhort the demonstration to action which would materially and substantially disrupt the university.

These cases indicate that the issue of the demonstration on the college or university campus is viewed by the courts in the context of the First Amendment area of free speech and the right of assembly. It appears that wide latitude will be given by the courts in regard to speech. However, when speech becomes action or when the operation of the institution or freedom of movement on campus is interfered with, the protection of the First Amendment is removed. It is clear then that there is no absolute freedom of speech and assembly regarding students, or, for that matter, the general public. The courts recognize limits especially when the rights of others are violated.

Causes of Campus Disruption

There is no list of absolute causes of campus unrest or disruption. However, the family, the social environment, and the college campus are factors which may contribute to student activism. The Senate Committee on Government Operations released its report on college campus disorders in March, 1971. In the report, Dr. Roger Heyns, Chancellor of the University of California at Berkeley, submitted the following list as possible causes of campus disorders:

1. The war in Vietnam
2. The desire to end racial and social injustice and to eliminate proverty
3. Disenchantment with the educational institutions which seemed to be removed from the problems of their times
4. Seemingly overriding desire to be heard and heeded by older persons
5. Many local and internal causes either legitimate or created to cause disruption.

In "Report of the Illinois Legislative Council" (Mooney, 1969), a defined list of student objectives included the following:

1. Student membership on Boards of Trustees
2. Meaningful student participation in the choosing, retention, and dismissal of faculty members and in the framing of curriculum and course content
3. Student participation in the formulation of policies relating to grading, entrance requirements, examinations, and the expansion of the university's physical plant
4. Student control over discipline, housing, and other academic matters
5. Complete personal freedom for students living off campus
6. A marked relaxation of or end to all manner of curfews and other restrictions upon the social life of students particularly in regard to relations between the sexes; in short, an abandonment by the University or college of the theory that it stands "in loco parentis" to its students
7. An end to campus R.O.T.C. whether of the compulsory or voluntary variety
8. An end to on campus recruiting by Dow Chemical, Central Intelligence Agency, or any other outside business, governmental, or industrial instrumentality
9. An end to or sharp curtailment of the university's research contracts or financial or scientific connections with agencies and firms whose primary purpose is profit or power and not the disinterested pursuit of truth
10. An end to any policy of restricting the speakers who may be invited to appear on campus and the subjects they may discuss there.

Recommendations and Possible Remedies

The end of the War in Vietnam and the discontinuance of the draft appear to have eased much of the student discontent and campus unrest. Unrest and campus tension can be averted if institutions inform each student and faculty member of the standard of conduct expected of him. In addition, college administrators should be especially sensitive to the procedures whereby a legitimate grievance can receive careful consideration. Colleges should give advance consideration to appropriate actions to be taken if disruptors are found to be students of other schools or non-students. One suggested course of action is the injunction process. Holloway (1971) discussed the bases for injunctive relief. First, the plaintiff must show that he has suffered or is threatened with irreparable injury. Second, if the order is to be issued ex parte (without notice to the other side), it must be shown that the injury will be immediate. Third, it must be shown that no other adequate remedy of law is available. Fourth, courts are beginning to require that internal remedies be exhausted before resorting to the injunction. The following is an example of a typical injunctive statement:

> This court is well aware that the right to peacefully protest and to disseminate even those views that may be abhorrent to a majority of the populace is the corner stone upon which our Constitution rests. However, where that protest as here, becomes violent and, in essence, deprives others of their rights to pursue their studies in relatively tranquil atmosphere, that protest can no longer be privileged or protected if society itself and the rule of law which governs it is to survive (Holmes, 1969, p. 278).

If the forbidden action continues following the issuance of the injunction, the offenders risk conviction of contempt of court. Of course an injunction would apply equally to students and non-students.

The Role of the University in Campus Demonstrations

It is seldom possible to choose the nature, the setting, and the timing of a particular campus demonstration. However, proper preparation should enable an institution to handle a crisis situation. First, every institution should have clearly formulated rules and regulations governing student conduct and disciplinary procedures which meet the basic standards of justice and which are promulgated. Secondly, contingency plans should be developed which define the assignments and specific roles and responsibilities of designated university officials. Zumwinkle (1971) stated that unless other arrangements are built into the system in some way, there is a great risk that the only significant input into the decision process will come from the two warring, polarized camps. He stressed the importance of institutionalizing the following:

> 1. Opportunities for involvement of moderates and other members of the university community who are concerned though not always vocal;
> 2. A consultative group of nonadministrators to advise the president and other executive officers on handling crises and incipient crises;
> 3. Relevant legal council from an attorney acquainted with the campus on a day-to-day basis and with the established traditions of the institution and the current mood and problems of the campus;
> 4. Mediation by a panel of respected trusted individuals in the university community, endorsed by administration, faculty, and student government, who can get the principal disputing parties around the table, set the stage for rational discussion of the issues, and determine points of agreement as a basis for de-escalating the conflict;
> 5. More utilization of those faculty and staff members who have already established effective relations and communications with the student leaders involved—members who may be forgotten as an issue escalates to the office of the president but who, with encouragement, support, and limited negotiating authority, have the potential for being enormously useful (p. 17).

Time, Place and Manner

Although it appears that the federal courts will not sustain the principle that university property is like private property, it is clear that limitations can be put on the place of a demonstration so long as limitations are general in application and not designed to discriminate against a particular group or activity. Presumably the designation of one spot on campus for demonstrations which is removed from the main flow of students would not be upheld by the courts, although there are no cases to support this claim. Likewise, there appear to be no cases on the specific problem of when a demonstration may be held, but it seems reasonable to assume that arbitrary restrictions would not be upheld. It would seem valid to prohibit a demonstration in a dormitory at a time when the students are normally sleeping. Finally, the question arises regarding the institution's ability to control meeting place and time. An institution may establish standards in relation to the utilization of its facilities which reflect its goals and objectives so long as the rights of others are protected. Such standards should provide elements which guarantee the rights of free speech and peaceful assembly.

Summary

Although student demonstrations have been widespread in recent years, they are not unique to the 1960's or even the 20th century. Many violent demonstrations took place at several colleges and universities in the 19th century. In the United States there are notable parallels between student activism of the 1930's and the 1960's. The two periods were economically unstable. In both instances, students were found to hold liberal views on the issues of war, freedom of speech, social progress, birth control, and pacifism, and they organized to express their concerns.

College officials sought help from the courts in order to respond to the violent student disruptions which occurred on United States college campuses during the 1960's. A significant number of the cases which reached the courts involved the interpretation of the intent of the First Amendment in guaranteeing freedom of speech and the right of people to assemble peaceably. The courts have established that the First Amendment does not grant immunity for every possible use of language. Also, they have affirmed the right of the institutions to establish reasonable codes of conduct to insure order and freedom of movement so long as they do not exercise prior restraint on freedom of speech and assembly. In this regard, colleges and universities are urged to publish standards of conduct and provide guarantees of due process for alleged violations of those standards. One type of conduct which is clearly improper, according to the courts, is the unauthorized occupation of buildings and the obstruction of free passage to and from college facilities. Also, the courts have distinguished between a peaceful demonstration which becomes disruptive and one which was planned to be violent and disruptive. In the latter instance, the protection of the First Amendment does not hold.

One course of action which has been extremely successful in restoring order on campus has been the use of a court injunction. Essentially, the court injunction guarantees the right to peacefully protest but forbids action which becomes violent and deprives others of their rights. Those who violate a court injunction risk conviction for contempt of court. In the vast majority of cases students have respected court injunctions.

In the aftermath of the most recent period of student unrest, it has become clear that proper preparation should enable an institution to handle a campus crisis situation. In order to do so, however, every institution should have clearly formulated codes of student conduct and established procedures, guaranteeing due process, for adjudicating alleged violations. Finally, the development of contingency plans which define the assignments and specific roles and responsibilities of designated college or university officials will enable an institution to respond to a disruptive situation in a reasonable and planned fashion.

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CODES OF STUDENT BEHAVIOR

by

Jack Hall and Stanley Blostein

There is little available in the literature regarding codes of student behavior prior to the 1960's. For the most part there was minimal concern on American campuses regarding the range of issues outside of generalized statements by institutions which established authority and spelled out a broad statement of expectations for the students. This is not to suggest, however, that prior to the 1960's student behavior was of no concern to the academic community. The question is not whether it had been of concern, but rather the degree and breadth of the concern. Certainly prior to the 1960's there were instances both major and minor of issues related to student behavior, e.g., students painting the president's cow at Harvard during the colonial period and the rather severe student revolts of the early nineteenth century, but these instances were rather isolated and did not represent the trend and pervasiveness of concern around student behavior that occurred later.

The best way to understand recent developments related to codes of student behavior is to perceive them in the context of the development of higher education in this country. Codes, per se, may not be as significant as how concern about student behavior reflects what are perhaps larger and more fundamental issues in higher education. This paper will first outline what the writers perceive to be significant developments in the history of higher education in this country and place these developments in the context of some suggested theoretical formation, which may help to make connections; it will then indicate the basic content of a typical code of student behavior, as well as identify what the writers perceive as some of the significant issues related to the process of code development and its concomitant legal implications.

Historical Perspective

It is impossible to review the development of higher education in the United States without being struck by the profound influence of religion on the foundations of higher education. The early colonial colleges were established out of a concern by the churches for the preservation and continuance of their doctrine. These colleges, founded on the Oxford and Cambridge prototype, were established as theological training seminaries. Harvard, the first of the colonial colleges, became a center for religious cross currents, and as a result of many of the fundamentalist Puritans' accusations that it was becoming too lax, Yale was founded with careful supervision of the private life of students and a rigorous following of religious observances. In essence, the colonial colleges were founded on the "Puritan ethic," i.e., hard work, perseverance, and religious observances will be rewarded in a later life. This dominance of the churches in the rise of American higher education created a framework which continued well into the nineteenth century.

Following the Revolutionary War there was increased interest in the development of an unique American form of education. There was discussion of a national university at the Constitutional Convention, but this was never brought to fruition. This period saw the development of many private colleges, as well as some of the early state colleges, foremost of which was th University of Virginia. The establishment of the University of Virginia as the first state institution was significant for several reasons: (1) it was the first institution that was established under public control and public support; (2) it had a scientific orientation rather than the traditional classical orientation which had been the hallmark of the English university; (3) there was student election of subjects rather than the rigidly prescribed courses that had been known in the colonial colleges; and finally, (4) the University of Virginia was nonsectarian rather than denominational. On the other hand, there was an increasingly large number of denominational colleges being developed which provided an education for the ministry of the denominations, as well as providing a means of transmitting the various doctrines.

This period saw the development of a conflict centering around the control of Dartmouth College which carried profound significance for both higher education and the institution of the Supreme Court. In 1819, the legislature of New Hampshire attempted to take control of Dartmouth College, change the charter, and establish an entirely new institution. The Board of Trustees argued that this action was unconstitutional, and the case was taken eventually to the Supreme Court. The Supreme Court upheld the Board of Trustees. Aside from the political overtones of the conflict, the decision was significant in that it protected the existence of independent, private colleges, and ended state efforts to control them. In addition, this decision officially sanctioned a duality of higher education in the United States of a private, independent system parallel to a state-supported system of higher education. At the same time, this action of the Supreme Court developed the powers of the court as an institution.

The development of land-grant institutions through the Morrill Acts of 1862 and 1890 also may be seen as an effort to protect against the domination of the classics in higher education. This period also saw the development of the "extracurriculum" as an attempt by students to meet some of their needs that were not being met through the traditional curriculum. At the same time, the Morrill Acts provided for the development of practical instruction at the collegiate level and for the vocational preparation of those portions of society for whom higher education had been almost completely closed to that point—the agricultural and industrial groups. While these changes were occurring in higher education, the society at large was undergoing dramatic changes of industrialization and a rather brief span of time saw significant changes in almost all aspects of American society, most of which had an impact on higher education.

The period between the American Civil War and World War I saw higher education in this country largely influenced by the German universities and the concept of graduate education, the prototype of which, in this country, was Johns Hopkins. This change in the idea of what the university should be was accompanied by tremendous increases in the enrollment in higher education, particularly after World War II when many veterans took advantage of government education benefits to attend the colleges and universities, and higher education saw older students entering the institutions. Accompanying this was the expansion of the curriculum, an issue that brought heated debate on both sides. The curriculum developed in multifaceted areas and has been the source of significant changes in higher education.

The culmination of these trends occurred during the 1960's when the large "multiversity," described by Kerr (1963), was in existence in many states, and the free speech movement was occurring at Berkeley. The concerns and activism of students across the country were the focal point of any discussion related to higher education. One of the basic questions asked by most administrators and many faculties was, "How can we control student behavior?" This period saw basic issues of university governance being raised as students demanded more voice in determining how the universities were to be run. The same time saw state legislatures responding to the demands of students by either threatening or actually intervening in the activities of the university, and in many instances, state legislatures required universities to develop codes of student behavior. The period of the 60's, then, was the significant turning point for many aspects of higher education, particularly codes of student behavior. In this period the swing was away from the discussion of *in loco parentis* to questions of institutionalizing means of controlling student behavior.

Some Suggested Connections

In order to make some connection and, at the same time, identify trends among the myriad threads that make up the history of higher education, the writers' found it useful to look at these events in the context of three theoretical formulations. This is not to suggest in any way that these are the only appropriate formulations by which to perceive these events, but these appear to offer the most promise for understanding in a historical perspective those events which culminated in the development of codes of student behavior. The formulations will be discussed very briefly, and the writers will in no way attempt to present them comprehensively, but to do so in such a way as to suggest the implications for the subject of this paper. These formulations are the "Collegiate Way," described by Rudolph (1962), issues of influence and authority discussed by Pierson (1973) and Wolff (1969), and an analysis based on several constructs developed by Karl Marx [see, for example, Fever (1969)].

The paternalism of the early colleges in their attempts not only to influence but to control almost all spheres of the lives of students led Rudolph (1962) to make the following statement:

> The collegiate way helped to establish the philosophic and historical foundations for many of the noninstitutional pursuits of the American colleges. The values that are cherished helped to restrain the intellectual (and, therefore, university) potential of many of the older foundations. Yale, in particular, would have difficulty in launching itself as a university because of its attachment to the Collegiate Way. It often led to an excessive paternalism, a hand-holding, spoon-feeding that would prolong adolescence unnecessarily. . . . It would account for the fact that no American institution of higher learning can be an institution of learning alone (p. 108).

A second threat that appears in the history of higher education centers around issues of influence and authority within the institution. The conflict has been notably pointed out by Pierson (1973), who suggested that the university has been moving from an authoritarian model to a model that is best described as a management/labor/consumer model. This latter model, which identifies the student in a substantially different role than the authoritarian model, has resulted in the institution seeking to control student behavior in new ways.

Of interest is the position taken by Wolff (1969), who described three types of relationships that may exist in the university community between students and faculty and among peers and proceeded to discuss the following question:

> In which of these educational relationships is there an appropriate exercise of authority? None. . . . Educationally speaking, the answer to the question How Should a University Be Governed? is simply: it shouldn't be. Or more precisely, it can't be, for any attempt to impose a structure of authority on truly educational human relationships must fail or else succeed mainly in making education impossible (p. 103).

Granted that this latter position might be somewhat utopian, it nevertheless presents an interesting counterpoint to the model of governance as described by the "Collegiate Way."

Finally, a brief look at Karl Marx's attempt to analyze institutions is useful in understanding the development of codes of student behavior through the perspective of the three constructs projected by Marx: the concept of history, the concept of spheres of influence, and the concept of class (Fever, 1969).

Marx's description of a ruling class and a ruled class is related to governance in higher education and in general to the question of who runs the university. His concept of history stated that the history of a society of institutions determines the behavior of all its members, and, thus, the question of a code of student behavior must be understood within the context of the history of how the role of students has been perceived in higher education. Marx's construct of spheres of influence is significant in understanding the historical framework for the development of codes of student behavior. Marx has pointed out that each generation's influence on the following generation is measured by the extent of its sphere of influence, i.e., the extent to which it can affect the lives and behaviors of others. If one reviews the history of higher education as a succession of spheres of influence, it is suggested that each sphere has been somewhat less influenced by the preceding sphere, culminating in the period of the 1960's. At this point, students were almost totally unaffected by the influences of the 40's and 50's, which helps to explain why this was a time when institutions had to formalize codes of behavior in order to replace what until then was a control exerted simply by tradition.

Codes of Behavior

This following section deals specifically with the elements contained within codes of student behavior: the composition, selection, and jurisdiction of tribunals; the process for establishing a code; and, finally, trends related to student codes. The writers will also attempt to relate these areas to appropriate legal opinions.

Student codes usually contain two basic elements—student rights and student responsibilities—although most codes have placed more emphasis on the area of student responsibilities than on rights. This, however, may be due to many rights being protected in codes without explicit statement. The three basic documents relating to student rights and responsibilities which provide a guide for the formation of student codes are the "Joint Statement on Rights and Freedoms of Students," "Statement of the Rights and Responsibilities of College and University Students," and the "Model Code for Student Rights and Responsibilities in Conduct" (Holmes, 1969).

As previously stated, the basis for developing most student codes began with the Berkeley demonstrations of 1964. Prior to that time, most educational institutions had a broad basic statement establishing the institution's authority, as well as what was expected in the way of behavior of individual students. A prime example is found in the University of Kentucky 1960 *Governing Regulations:*

> The Dean of Men shall exercise general supervision over the nonacademic welfare of all men students including housing, food service, social and extra-curricular activities, morale, conduct, discipline, outside employment, fraternity affiliations, and other personal and social problems. He shall interpret the institution's objectives to men students and their parents and cooperate with the academic deans in the furtherance of higher standards of scholarship (p. 14).

The rules of the University Faculty for 1960 further defined the University's expectations as follows:

> The University expects all students to hold to strictest standards of honesty and conduct themselves in a similar manner bearing in mind that their conduct determines in a large measure their reputation and that of the institution. The major disciplinary penalties at the University shall be expulsion, suspension, disciplinary probation and reprimand (p. 18).

Since that time the University of Kentucky and most major institutions have developed elaborate codes of student conduct. Most of these codes are divided into two areas, the academic and non-academic. At some institutions, they are published in a single document and at other institutions are published in separate documents. The basic decision to separate or leave them together usually is based on the location of jurisdiction and power to amend.

The nonacademic area of most student codes is divided into four major parts: (1) rules, (2) sanctions, (3) rights, and (4) composition, selection, and jurisdiction of tribunals. In the first area, rules, most codes contain rules that define the prescribed conduct with relationship to the following items: (1) interference, coercion, disruption; (2) lewd, indecent, or obscene behavior; (3) abusive, drunken, or violent behavior; (4) drugs; (5) physical violence; (6) unauthorized entry or occupation; (7) motor vehicle and parking; (8) failure to comply with officials; (9) stealing; (10) defacing, disfiguring, damaging or destroying; (11) hazing; (12) passing worthless checks; (13) false testimony; (14) lifting, taking, or acquiring; (15) a special set of regulations for student organization; (16) a special set of regulations for residence halls; (17) cheating; (18) plagarism; (19) violation of local, state or federal law. "Cheating and plagarism" appears in the nonacademic section as often as in the academic section. The last rule, "violation of local, state or federal law," is often used as a catch-all phrase to cover anything that has not been covered in one of the previously mentioned items.

In the second area, that of sanctions, there is usually wide variation, among which might be (1) admonition; (2) warning; 3) reprimand; (4) probation; (5) withholding of transcript for degree; (6) block against readmission; (7) suspension of privileges, (i.e., athletic, extracurricular, student organization membership); (8) failing grade; (9) denial of degree; (10) suspension from the university; (11) expulsion from the university; (12) restitution, (work or money).

In most codes special sanctions are established for student organizations; these usually relate to their continued use of university facilities or name and the organization's continued recognition or registration as a recognized student organization. Also special sanctions are usually established for residence halls. Currently these relate to a contractual agreement between the student and the institution. In most cases there is some restriction as to punishment. Normally it would provide for suspension from the housing unit, but it would not provide for sanctions on a university-wide basis such as expulsion, suspension, or probation.

In the third area, rights, most student codes provide for a nondiscrimination statement, especially in the areas of admission and financial aid. These statements usually make reference to race, color, religion, sex, national origin, age, and political beliefs. Most codes also provide for the right of privacy which covers the areas of search and seizure with respect to disciplinary records, counseling records, health records and academic records, as well as residence hall rooms. There are other established rights such as the rights of freedom of expression, freedom of assembly, freedom of the press and the rights of the accused. The latter should include (1) the right to a fair notice in writing, (2) the right to a fair hearing, (3) the right to a fair tribunal (not to include those who pressed the charges), (4) the right to nonlegal counsel, (5) the right to confront and cross-examine the accusers and witnesses, (6) the right to a record of the hearing, (7) the right to avoid self-incrimination, (8) the right of appeal within the college, (9) the right of appeal to civil court.

The composition, selection, and jurisdiction of the tribunal is probably the most important area of all. There are five criteria that should be met for the judiciary to qualify to handle problems on a campus: (1) the judiciary should be confident and qualified to do its job; (2) it should be fair and impartial; (3) it should be acceptable; (4) it should be suitable for doing a particular job entrusted to it; (5) it should be consistent with the traditions of the particular institution in which it is established. The area of tribunals is probably that which still has the most diversity among institutions of higher education. In general, there are three main types of tribunals in use: the mixed faculty-student tribunal; the all-student tribunal; and the individual hearing officer tribunal. There are many arguments, pro and con, concerning the preference or reliability of any one of these types, and added to this concern are other variables affecting the composition of the tribunal which must be considered. Among these variables are the method of selection, i.e., appointment, random selection, or some combination of these; the scope of jurisdiction; the nature and geographical limits of jurisdiction; the academic and nonacademic jurisdictions; the question of rights and the jurisdiction of the tribunal to handle rights cases; the appeal process; the final decision, i.e., who is ultimately responsible for students, faculty, and president.

There are any number of studies that one might cite to identify the trends in student codes. The writers have selected four studies, which appear most illustrative. Jenison (1972a) studied 460 students and 201 faculty members at Iowa State University of Science and Technology. He requested that they respond to 28 disciplinary situations: 13 on campus, 13 off campus, and two academic. Three major differences appeared: (1) faculty were more severe where the situation was academic and students were more severe where the situation was nonacademic; (2) females were more severe than males; and (3) seniors were the most severe of all classes of students.

In a second study, Jenison (1972b) used the same sample group and restricted his study to only the two academic offenses, cheating and plagarism, and compared the academic situations to six possible punishments. The following results were found: (1) most faculty and students considered crib notes more serious than plagarism; (2) the faculty considered plagarism more serious than did the students; (3) the higher the degree held by a faculty member, the more serious he considered all the violations; (4) students in residence halls were more severe than those off-campus regarding plagarism; (5) there was no correlation between the severity of the punishment and the relationship of either students or faculty to a particular academic college.

In a study by Bailey and Sheppell (1972), the authors made a comparison between deans active in 1935 and contemporary deans in 1972; 300 deans of men at coed institutions were sampled, and several changes were noted. First, the enforcement of payment of private bills had decreased by 61 percent. Secondly, the enforcement of the requirement for automobile registration had decreased by 23 percent. Thirdly, the administrative penalties invoked for unsatisfactory work had decreased by 56 percent. Fourth, the administrative penalties involved for absence for assemblies had decreased by 40 percent. Fifth, administrative penalties involved for class absences had decreased 37 percent. Finally, it should be noted that penalties invoked for infractions of social regulations had increased by 7 percent.

In a recent article, Yarbrough (1972) sampled every university with more than 10,000 students, as well as an additional 194 institutions to assure at least one institution in each state. Of the 174 institutions returning questionnaires, 62 percent had comprehensive codes. Of these, 43 percent were for students only, and 19 percent were for students, faculty, and staff. Thirty-eight percent reported that they did not have a comprehensive code. Of these, 1.7 percent stated that they had no significant rules for students and 36.2 percent of them reported that the only rules they had appeared in either the handbook or the catalog.

In summary, there seems to be a tremendous emphasis in institutions, especially those which are coed and larger than 10,000 students, to have comprehensive codes leaning strongly toward legalistic and judicial statements and procedures. Although there seems to be some leveling at this point, many institutions are still much influenced by the courts and their recent decisions.

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DUE PROCESS IN HIGHER EDUCATION

by

Robert Clement and Robert Moore

In 1837, William O. Graham was dismissed for refusing to perform in the Junior Exhibition on grounds of principle. His class supported him, and certain ones of them were also expelled. There was no court action (McCarthy, 1970).

In 1854, James M. Doby was expelled for warning his fellows of a faculty inspection. Thirty-three of his classmates signed a letter to the faculty threatening to boycott college exercises until his reinstatement. The college suspended all of them. Again, there was not any court involved (McCarthy, 1970).

In 1923, a Bryn Mawr college student, Miss Barker, was dismissed without a hearing or formal charges. The only charge ever recorded against her was that "she did not measure up to the standards expected of a typical Bryn Mawr girl" (Witmer, 1969, p. 4). In the decision of *Barker v. Bryn Mawr College* the court upheld the dismissal.

In 1956, a former University of Illinois medical student, Miss Bluett, appealed her expulsion on the grounds that the college had denied her due process. She was expelled for alleged cheating in examinations without any notification of the cause until a year later. She was never given the opportunity to introduce witnesses in her behalf or present evidence to support her denial of the charge. The court in *Bluett v. University of Illinois* sustained the expulsion (Chamber, 1972). This decision did not go unnoticed in the legal world. Warren A. Seavey, well-known Harvard Law School professor, severely castigated the University of Illinois and the Illinois court for their handling of the Bluett case. He stated it as follows:

> It is shocking that the officials of a state educational institution which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket (Gordon, 1971, pp. 96-97).

Institutions of higher education did not follow his advice in their actions, but time was running out for them.

In 1959, in the case of *Steier v. New York Educational Commissioner,* the court upheld the expulsion of Arthur Steier, a Brooklyn College student, for failure "to conform to the requirements of good manners and good morals" (Wright, 1969, p. 1028).

These decisions, some involving judicial actions, reflected the current common-law view toward the relationship among students, institutions, and the court. The two majority opinions in the Steier case exemplify the various courts' positions in cases of student disciplinary action. The first opinion stated, "Education is a field of life reserved to the individual states. The only restriction the federal government imposes is that in their educational program no state may discriminate against an individual because of race, color, or creed" (Wright, 1969, p. 1029). The second majority opinion stated that the federal courts had jurisdiction but that, no constitutional right of Steiers had been denied. Steier had agreed to conform to Brooklyn College's rules and regulations, and this was a matter of grace, not right.

This decision reflected the law correctly as it was defined at that point in time. Court decisions uniformly agreed that students could be expelled for whatever reasons and by whatever procedures university authorities thought proper.

In retrospect the surprising thing is not that Steier lost his case, but that he lost it to a divided court. Chief Justice Clark in his dissent argued that Steier's conduct had called for patient response rather than discipline and expulsion. And he rejected the court's interpretation:

> The Fourteenth Amendment to the United States Constitution is a paltry piece of class legislation limited, it seems, to according protection to Negroes in the South and Jehovah's Witnesses in other areas. Surely the noble privileges therein embodied are not to be thus denigrated (Wright, 1969, p. 1030).

Eloquent as the dissent was, it was only a dissent. Steier remained expelled. However, this victory for institutional autonomy, if indeed it was a victory, was the final gasp of a dying order.

Normally the law changes slowly reflecting societal changes; however, two days after the Supreme Court declined to hear Steier's appeal, an incident occurred in Montgomery, Alabama, which was to shake the very foundations of discipline in higher education. The famous case, *Dixon v. Alabama State Board of Education*, has become a landmark in the application of due process in higher education.

Due process is not a new concept. Why then has it come to the fore on the college campus? Perhaps a brief historical look at the concept of due process and an attempt to define it are in order.

In 1037, Conrad II expressed the idea of due process when he declared that "no man shall be deprived of his land but by the laws of the empire and the judgment of his peers" (Witmer, 1969, p. 2). This principle was later incorporated into the Magna Carta. The actual phrase "due process of law" was first used in the 1354 statute of Westminister of the Liberties of London.

In American jurisprudence, before the adoption of the Fourteenth Amendment, in the case of *Ham v. McClaws* (1789), the attorney for the defense defined the concept most eloquently:

> There are certain fixed and established rules, founded on the reason and fitness of things, which are paramount to all statutes; and if laws are made against these principles, they are null and void (Mott, 1926, p. 198).

The concept of due process was later formulated by the Congress in the Fifth and Fourteenth Amendments to the Constitution. Nevertheless, due process had not become ultimately defined as to its implementation even at this point. People took the concept for granted; even during the adoption of the Fourteenth Amendment, due process was the least discussed provision of the Amendment by the Thirty-Ninth Congress (Mott, 1926).

The court in *Hannah v. Larche* best stated the concept, especially as it relates to use in higher education:

> 'Due Process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account (Wright, 1969, p. 1069).

Due process was not defined in its exact applicability and implementation in higher education until 1961 in the Dixon case. Prior to this time the concepts of *in loco parentis,* contract theory, educational privilege, and the institutional autonomy as opposed to the individual's constitutional rights set the standards of college disciplinary action.

There are two types of due process—procedural and substantive. Procedural due process refers to the procedures and methods employed in seeing that laws and regulations are carried out and enforced. Laymen, in most instances, examine procedural due process. However, substantive due process goes to the very heart of the law or regulation in question. It deals with the way in which regulations being applied have been drawn and drafted. Whereas procedural due process deals with *methods,* substantive due process deals with *reasons and motives.* The question involved in substantive due process is whether having a standard of a certain kind has any causal connection with the educational function that is being provided. Most people conceive of due process strictly in its procedural interpretation.

The landmark Dixon case was concerned with procedural due process. Although the substantive due process could be questioned in this situation, the case was tried, and a decision rendered only on the procedural aspects. education.
This can be said of a great many cases concerning due process in higher

The Dixon case involved the dismissal of several black students following their participation in a sit-in at an off-campus lunchroom. They were judged guilty of "conduct prejudicial to the school and for conduct unbecoming a student or future teacher in schools in Alabama, for insubordination and insurrection, or for inciting other pupils to like conduct" (Wright, 1969, p. 1030-1031).

The students were subsequently dismissed without notice and hearing. The decision was upheld in the lower court but was reversed by the Fifth Circuit Court of Appeals. The judgment relied upon the fundamental principle that "whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." It also stated that even though education is a privilege rather than a right, "it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process" (Wright, 1969, p. 1031).

The court went on to say *in dictum* that although there was no requirement of a full-dress judicial hearing with the right to cross-examine witnesses, the rudiments of an adversary proceeding must be provided. It then proceeded to outline the kind of notice and hearing due process requires. The rudiments of an adversary hearing, as set forth in the Dixon case, are as follows:

1. The accused shall be given a notice giving the specific charges made against him.
2. A hearing should be held where both sides of the case are heard.
3. The hearing should elicit information for both sides, and if possible the accused should be able to face his accusers.
4. If the accused does not face his accusers, he should be furnished a list of the names of witnesses and a statement of the facts they testified to.
5. The student should be allowed to present oral or written testimony in his behalf.
6. The student should be advised of the results of the hearing (Bakken, 1968, p. 45).

Since that time there has been no instance of a student's dismissal from a state-supported institution upheld by court action without the minimum due process requirements of notice and hearing. The Dixon case set the stage for the further refinement of the concept of due process in higher education.

In *Knight v. State Board of Education* (1961) the U. S. Middle District Court of Tennessee stated that due process required notice and a hearing before students at a tax-supported institution could be suspended or expelled.

Esteban v. Central Missouri State College (1967) clarified the type of judicial hearing required at an educational institution. In its decisions on the Esteban case itself, the court reiterated the Dixon rule that the Fourteenth Amendment applies to discipline procedures at a tax-supported university. However, it emphasized that the proceedings need not be a formal court-type judicial hearing such as required in criminal cases. Essentially, the due process requirement is one of notice, fair hearing, and a decision based upon the evidence (Hill, p. 424).

Further refinement occurred in the now famous "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education" (1968), written by the United States District Court for the Western District of Missouri, En Banc. It stressed three minimal requirements applying in cases of severe discipline and growing out of fundamental conceptions of fairness implicit in procedural due process:

1. The student should be given adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based.

2. The student should be given an opportunity for a hearing in which the disciplinary authority provides a fair opportunity for hearing of the student's position, explanations, and evidence.
3. No disciplinary action be taken on grounds which are not supported by any substantial evidence (pp. 17-18).

However, the court also stated that within the limits of due process institutions needed the freedom for the development of various types of disciplinary procdures that would not only be consistent with their varying functions and processes, but would also be relevant to their lawful missions without putting an unreasonable strain on their resources and personnel.

Further refinements have occurred in recent cases. Generally, the required rudiments of an adversary system include the following:

1. There must be notice and some opportunity for a hearing before students may be expelled.
2. Notice of the specific charges two full days before the hearing is sufficient.
3. There need not be a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.
4. Disciplinary proceedings are not to be tested according to niceties of procedure required in court.
5. The technicalities governing the burden of proof in civil or criminal cases are irrelevant.
6. The findings of the hearing committee must be based on substantial evidence and may not be arbitrary and capricious.
7. The student must be granted an opportunity to produce evidence in his own behalf.
8. Testimony proffered against the student-accused by members of the committee hearing his case is not such a denial of fundamental fairness as to deny due process in the absence of a showing of bias or prejudice (Pettigrew, 1971, pp. 115-116).

We can see how the courts have been building on those guidelines set down in the Dixon case.

The overwhelming majority of cases that discuss the applicability of the Fourteenth Amendment to student disciplinary actions have been confined to situations at state-supported institutions as opposed to private institutions.

The Fourteenth Amendment concerns itself with the actions of the state. Its wording "no state shall" indicates a state or a state agency, such as a public-supported institution of higher education. The real test of applicability of protection under the Fourteenth Amendment is distinguishing what actions or institutions come under the auspices of the state.

An important case in making this distinction is *Burton v. Wilmington Parking Authority* (1961). The Supreme Court stated that there is no formula that will establish the presence or absence of state action in an institution. Each case must be determined by its own merits because the federal and state governments are so large that their actions can be found almost anywhere (Johnson, p. 346). The Burton rule has been used by opposing opinions even on the same case. The rule lacks a great deal of conciseness, and its present and future applicability is questionable.

According to Gehring and Young (1970), several cases have established that the receipt of public funds, the contract to provide various programs for the state, and a tax exemption do not involve state action or make the institution subject to federal constitutional requirements.[1]

The state-action concept as applied to higher education has lagged behind other areas such as civil rights. However, this distinction between public and private is rapidly narrowing. The real judicial test is determined in "an evaluation of the personal right to discriminate balanced against the public's concern for the elimination of discrimination" (Johnson, 1964, p. 346). This interpretation applies to substantive as well as procedural due process.

Another source guaranteeing due process to the student lies in the inherent sense of common law theory which implies an institution's responsibility to meet some degree of fairness in its relationships. This idea pervades everything in the institution and is put in the frame of due process. The institution ought to be fair with *everybody*. This concept runs from the institution to the student. However, in large institutions there is the risk that students will extend their own fairness concept. Accepting the student as a first-class citizen is fast becoming the trend, and consequently institutions should take a legitimate due process position. Regardless of the source of power, the concept of fairness must be maintained. Cohen (1968), in his article entitled "The Private-Public Legal Aspects of Institutions of Higher Education," summed up the importance of private-public issue nicely:

> The point is not that there are no differences between public and private schools, but that among the differences between institutions, the public-private distinction is the least important, or one of the least important distinctions (pp. 664-645).

Due process in higher education is here to stay. The question now is how far do we go with it. There is some risk in both the procedural and substantive areas of due process if they are carried to the extreme. For example, in their attempt to formulate comprehensive procedural measures, institutions may neglect meeting the minimum standards of substantive due process. They may think that because they have an elaborate, complicated, democratically constructed hearing body that all their regulations are meeting the minimum standards of substantive due process. That simply is not so! The notion of vagueness in standards or rules can creep into the situation at this point. Also there is some risk that overjudicialization of due process will create the impression that nothing is going to happen to people who violate the regulations until after the complicated hearing. The closed society of the campus cannot always live with the slowness in imposing some kind of summary, emergency, protective measures. In the total operational sense of the institution, this means fairness to everybody, without being unfair in the constitutional sense to the student charged.

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[1] Grossner v. Trustees of Columbia University (287 F. Supp. 535, U.S. Dist. Ct., S.D.N.Y., July 1968), Powe v. Miles, (294 F. Supp. 1269, U.S. Dist. Ct. W.D.N.Y., 1968), and Browns v. Mitchell (409 F. 2d. 593 U.S. Court of Appeals, 10th Circuit, January 1969).

It is interesting to note that during interviews with several different student-affairs administrators the point repeatedly was made that more and more students were opting for "out of court" settlements on the campuses. Perhaps students see more value in a one-to-one relationship when it comes to discipline.

In closing, all colleges and universities would be well advised to be alert to trends and to adopt at least a minimum due process requirement substantively and procedurally for their operation. The long-term interests of the university require that it do what is right. Perkins (1967) summed this up succinctly:

> Law courts are a last resort, to be used only when human relations fail. If education is to be regarded as a necessary means to a civilized society, the academic community must lead the way by conducting itself with civility and learn again to be in truth a community [illegible] 13).

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ACADEMIC FREEDOM AND FACULTY TENURE

by

Marizu Richardson and Ken Bean

The objectives of this paper are to present the principles and procedures relating to academic freedom and tenure which are set forth in official statements of the American Association of University Professors (AAUP), to review tenure procedures as practiced at the University of Kentucky, and to examine some of the legal issues involving both tenured and non-tenured faculty.

Academic Freedom

A special committee of the AAUP (1956) justified academic freedom by making the following statement:

> The maintenance of freedom of speech, publication, religion, and assembly (each of which is a component of intellectual freedom) is the breath of life of a democratic society. . . . To an increasing extent, society has come to rely upon colleges and universities as a principal means of acquiring new knowledge and new techniques, of conveying the fruits of past and present learning to the community, and of transmitting these results to generations to come. Without freedom to explore, to criticize existing institutions, to exchange ideas, and to advocate solutions to human problems, faculty members and students cannot perform their work, cannot maintain their self-respect. The liberty that is needed requires a freedom of thought and expression within colleges and universities, a freedom to carry the results of honest inquiry to the outside, and a freedom to influence human affairs in the same manner as other informed and unprejudiced persons do (p. 54).

Machlup (1955) argued as follows:

> With regard to some occupations, it is eminently in the interest of society that the men concerned speak their minds without fear of retribution. . . . The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work consists of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines. And if some professors lose their positions for what they write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced (p. 756).

The AAUP formulated the original statement on academic freedom and faculty tenure in 1940. This document, referred to as the 1940 Statement, is the Association's fundamental statement in this area. Since this statement is so fundamental to academic freedom and faculty tenure, a review of the document is in order. The statement reads as follows:

> The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to

assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability. Upon freedom and economic security, and hence upon tenure, depends the success of an institution in fulfilling its obligation to its students and to society.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman. The judgment of what constitutes fulfillment of these obligations should rest with the individual.

Academic Tenure

(a) After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education, but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended

> beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of that period.
>
> (3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.
>
> (4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal, whether or not they are continued in their duties at the institution.
>
> (5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide (pp. 49-54).

Section 4 of the 1940 Statement deals with academic due process. Academic due process is a system of procedures designed to produce the best possible judgment in those personnel problems of higher education which may yield a serious adverse decision about a teacher. It is analogous to legal due process but only that, and often different. The AAUP in a 1958 Statement recommended an eight step system of academic due process. The steps include (1) preliminary proceedings concerning the fitness of a faculty member, (2) commencement of formal proceedings, (3) suspension of the faculty member, (4) hearing committee, (5) committee proceeding, (6) consideration by hearing committee, (7) consideration by governing body, and (8) publicity (Joughlin, 1969). The AAUP presents these not as a norm but rather as a guide to be used by institutions in giving effect to both faculty tenure rights and the obligations of faculty members in the academic community.

In discussing the scope of academic freedom, Fuchs (1963) made the following statement:

> Academic freedom is that freedom of members of the academic community, assembled in colleges and universities, which underlies the effective performance of their functions of teaching, learning, practice of the arts, and research. The right to academic freedom is recognized in order to enable faculty members and students to carry on their roles. It is not sought as a personal privilege, although scholars enjoy the activities it permits, and the tenure rights of faculty members, which are conferred after a period of probation, bestow economic security as well as forestall restrictions on freedom that might stem from the power to dismiss. In relation to tenure the position of the faculty member resembles that of the judge who holds office during good behavior to safeguard his fearlessness and objectivity in the performance of his duties (p. 469).

Recent discussions have shown that there is much confusion about the meaning, the purposes, the scope, and the implementation of academic freedom. Machlup (1955) enumerated several of these misconceptions:

1. Academic freedom should not be conspicuously advertised, lest it be resented, and it should be presented simply as an aspect of general freedom of speech.
2. Academic freedom is claimed by professors as special privilege solely in their own interest.
3. Academic freedom concerns only the relationship between the scholar and the members of the board of trustees of his college or university.
4. Academic freedom means protection from dismissal, and the principles of academic freedom can be identified with rules for academic tenure.
5. It has been debated whether or not academic freedom has a "counterpart" in some particular responsibilities on the part of those to whom freedom is granted.
6. Academic freedom need not be so far-reaching as to protect dissenters from the usual consequences of their unpopularity.
7. Academic freedom must not be granted to those who abuse it.
8. Academic freedom should be confined to the recognized area of the individual scholar's competence and must not be extended to writings or utterances "outside his field."
9. Academic freedom must not include the right to advocate or teach "subversive ideas."
10. Academic freedom should be granted only to scholars loyal to the present form of government and "diligent and loyal in citizenship."
11. Academic freedom does not include the freedom to teach or even to hold doctrines dictated by some outside authority and slavishly accepted by a teacher who has surrendered his own independence of thinking.
12. Academic freedom must be denied to those who conspire to destroy it.
13. The requirement of a prescribed oath for academic teachers is consistent with, and no abridgment of, academic freedom.

All of these statements are either negative, critical, questioning, or erroneous, but they serve as an attempt to clarify some of the issues on which dissension appears to be most bewildering.

Confusion continues to surround the issue of academic freedom and faculty tenure, but Keast (1973) stated that academic freedom is so central to the integrity of our educational institutions and to their effectiveness in the discovery of new knowledge, in conservation of the values and wisdom of the past, and in promotion of the critical inquiry essential to self-renewal that academic tenure should be retained as our most tested and reliable instrument for incorporating academic freedom into the heart of our institutions.

Faculty Tenure

In order to guarantee academic freedom, the AAUP at the time of its inception in 1915 issued a policy statement on tenure, the purpose of which was to provide the necessary safeguards to insure academic freedom. Tenure, therefore, may be construed as essential to the maintenance of a free and open climate at institutions of higher learning.

Machlup (1964) defined academic freedom as follows:

> A title to a (qualified) permanent position or as the ground on which the teacher or investigator may confidently expect to hold his position until he is retired for age or permanent disability or separated for adequate cause under due process or because of financial exigencies of the institution (p. 114).

There are four types of tenure:

1. Tenure by law exists for certain state institutions.
2. Tenure by contract exists in a good many institutions where the bylaws contain provisions about the continuity of appointments and where these bylaws are made an integral part of the contracts with the faculty members.
3. Tenure by moral commitment or moral code rests on what the profession has come to regard as acceptable academic practice as it is spelled out in the 1940 Statement of Principles.
4. Tenure by courtesy, kindness, timidity, or inertia is merely a de facto status without legal, contractual, or moral commitment.

Tenure by law and tenure by contract can be enforced by the pressure of moral forces. Tenure without commitment cannot be enforced; however, many members of the academic profession hold their positions indefinitely because the administrative officers are nice, kind, timid, or lazy.

Strict tenure rules have disadvantages for institutions, scholars, and the profession. The institution cannot get rid of deadwood (substandard teachers on the permanent faculty) and, hence, cannot within a reasonable period of time accomplish a desired upgrading of its faculty. It cannot judge the qualifications of new junior faculty members in the "too short" probationary period. It can lose some "late bloomers" by letting them out before they acquire tenure or get stuck with some "never bloomers" by keeping them too long. The institution may find its faculty deteriorating because some professors on tenure get lazy, stale, and dull. Institutions which need large junior faculties for elementary courses with large undergraduate enrollment but are unable to grant tenure to all or most of these teachers must terminate these junior faculty members just when they have enough experience to do a good job of teaching; quick turnover lowers the quality of teaching and, moreover, imposes a heavier burden of recruiting than would be necessary if these junior faculty members could be kept on longer. A final disadvantage to the institution is the growth of mediocrity, a problem that cannot be blamed on poor judgment or bad policies. The problem is that some professors deteriorate over the years. They stop producing as scholars, they do not prepare new course material, and they probably bore their students.

There are two categories of individual scholars who may suffer as a result of strict tenure rules. First are the young teachers in the most prestigious universities who cannot obtain promotion to tenure rank within the stipulated probationary period and must be let out under up-or-out practice. Either they are unable to complete and publish the research that would prove their scholarly qualifications, or there is at the moment no vacancy with tenure rank. The second category is that of the teacher who starts in a top-rank university and, unable to prove his scholarly qualifications, must be given notice at the end of his sixth year. From then on he may have to pack and move every four years until he finds a position in an institution where he is able to meet standards.

In the case of the first category it is true that an institution may lose a good scholar now and then when strict tenure rules are enforced. However, in the second case the hardships which the strict system inflicts upon the individuals are offset by the advantages to the institution, which is saved from loading up with nice persons who do not meet academic requirements.

Strict tenure rules are disadvantageous to the profession in that a tenure system may tend to attract security-minded rather than enterprising, timid rather than adventurous characters, and the academic profession would be better if it attracted fewer milksops and more fire eaters. Also, the existence of the tenure privilege tends to keep professional salaries lower than they would be otherwise. The supply of teachers is increased if job security is an added incentive, and an increase in supply usually tends to reduce salaries. Machlup (1964), having enumerated the many criticism of strict tenure, concluded that strict tenure rules, implemented through a firm up-or-out practice, minimize the risk of appointing and retaining teachers or investigators who do not meet the academic standards of the institution.

Byse and Joughlin (1959) summed up the status of tenure today in the following statement:

> Tenure is embodied in a bewildering variety of policies, plans and practices; the range reveals extraordinary differences in generosity, explicitness and intelligibity. There is no concensus concerning either criteria or the procedures for acquiring and terminating tenure (p. 133).

Tenure at the University of Kentucky

According to the University of Kentucky Self-Study Report (1969-70), tenure provisions at the University of Kentucky follow the AAUP 1940 Statement of principles on Academic Freedom and Tenure. The University of Kentucky policy is an up-or-out system with a maximal institutional commitment to review in seven years.

The total faculty including the community colleges and medical center is 1,576. Of this number, 52 percent have three years service or less. On the surface it would appear that the danger of becoming "tenured-in" is not an imminent problem. However, this is true only for the university as a whole and does not apply to an individual unit whose entire faculty may be tenured.

The Deans of the Colleges have the authority to make appointments to the ranks of Instructor and Assistant Professor and promotions from Instructor to Assistant Professor without reference to the Area Advisory Committee. However, promotion to tenured positions (Associate Professor) must follow the procedure as set forth in the procedural statement.

There are six area advisory committees, each of which is composed of five members from the various disciplines within the particular area involved. They are as follows:

1. Area Committee for Social Sciences
2. Area Committee for Biological Sciences
3. Area Committee for Humanities and Arts
4. Area Committee for Physical and Engineering Sciences
5. Area Committee for Extension Services
6. Medical Center Area Committee for the Clinical Sciences

These committees evaluate the candidate in the areas of research, teaching, service, and professional standing, using the following criteria of evaluation:

1. Research—the extent of publication and quality of the research. The quality of the research is based upon the journal in which it is published and peer evaluation of the publications.
2. Teaching—based upon peer evaluation and student evaluation.
3. Service—simply a record of the activities or services performed toward internal management or governance of the university.
4. Professional standing—99 percent peer evaluation. Letters from tenured colleagues and letters from people away from the institution who know the candidate by his professional reputation.

The area committees act in an advisory capacity to the responsible vice-president. The vice-president can either accept or reject the recommendation of the committee. If he rejects the recommendation, it goes back to the dean who may protest the ruling and appeal directly to the president.

Legal Issues

The primary distinction between teachers being "tenured" or "untenured" is statutory. Tenure status basically requires the teacher to be employed for a probationary period of specified length, and if the college wishes to continue the employment beyond this period, that institution will then develop a relationship that is permanent until the teacher either retires or resigns.

The Kentucky statute, codified as K.R.S. 164.230, reads as follows:

> The board of trustees has full power to suspend or remove any of the officers, teachers, professors or agents that it is authorized to appoint, but no president,

> professor or teacher shall be removed except for incompetency, neglect of or refusal to perform his duty, or for immoral conduct. A president, professor or teacher shall not be removed until after ten days notice in writing, stating the nature of the charges preferred, and after an opportunity has been given him to make defense before the board by counsel or otherwise and to introduce testimony which shall be heard and determined by the board.

For a college board to dismiss a tenured teacher, there must be a showing of cause, i.e., that dismissal is for good and sufficient reasons as opposed to arbitrary or capricious ones. In other words, the burden of proof is on the institution.

The problem for the non-tenured teacher is whether he has any rights and protections or simply holds his position at the sufferance of his superiors.

The uncertainty stems in part from the right-privilege dichotomy. Public employment is a privilege, not a right subject to the protection of the due process clause of the Fourteenth Amendment. However, the Supreme Court has circumvented this dichotomy on several occasions by simply looking at the relevant interests (Palmer, 1972).

The basis for federal court appeal by an untenured teacher when dismissed for unspecified reasons lies principally under section 1983 of the Civil Rights Act of 1871. This statute has two primary requisites. The first is that the actor be found to be acting under color of state law. The second requisite is a finding of the deprival of a "right." Herein lies the problem.

In the case of *Jones v. Hooper* (1969), a college professor was dismissed with no given reason. He carried his case to the federal courts under section 1983. The court pointed out the two elements noted above and then, in finding against the plaintiff, asked what right he had been deprived of (right-privilege dichotomy)!

However, in *Keyishian v. Board of Regents* (1967) the Supreme Court rejected the idea that "public employment, which may be denied altogether may be subjected to any conditions regardless of how unreasonable." The board has the right to turn down an applicant for a job, but once employment is granted, it cannot be conditioned by onerous terms. The distinction lies in the lack of opprobrium attached to simply not being hired as opposed to being dismissed.

The court again directed itself to teacher's constitutional rights and their exercise in *Pickering v. Board of Education* (1968): "We hold that in a case such as this, in the absence of proof of false statements knowingly made by hm, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis of his dismissal from public employment" (391 *United States Supreme Court Reports* 563).

In *Wieman v. Updegraff* (1952) the court made this statement: "We need to pause to consider whether an abstract right to public employment exists. It is sufficient to say that the constitutional protection does extend to the public servant whose exclusion is patently arbitrary or discriminatory" (344 *United States Supreme Court Reports* 183).

In *Flucker v. Alabama State Board of Education* (1941), the court ruled that the need to upgrade the faculty in order to comply with association standards was permissable grounds for dismissal.

The desire to increase harmony in the faculty also was ruled a legitimate cause for dismissal in the case of *Shirck v. Thomas* (1971).

The legal questions surrounding tenured and in particular nontenured professors appear to be in a state of flux. In recent cases, questions concerning nontenured teachers' exercise of constitutional rights have been viewed more favorably by the courts. Whether this is an indication that in the future universities will find it necessary to offer the protections of academic due process to nontenured professors (not under contract) is yet to be determined.

Conclusions

Several alternative systems to tenure have been proposed ("Report of University of Utah Commission," 1971). Nearly all of these proposals include at least one of the following approaches:

1. Elimination of tenure
2. Fixed-term renewable contracts
3. Unions and collective bargaining

In the opinion of the writers, there is an implicit threat in all three approaches. Educational values associated with the tenure system—freedoms to teach, learn, investigate, evaluate, criticize and communicate—would be in jeopardy if the tenure system were abolished.

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COLLECTIVE BARGAINING

by

Robert Clement and Billy Melton

The purpose of this paper is to describe and analyze the development of collective bargaining as it relates to higher education. The writers hope to accomplish this by defining collective bargaining, giving a brief sketch of its development in higher education and explaining why it has come about, giving some opposing views on unionization, exploring some legal implications, and presenting some models and alternatives to collective bargaining.

What is Collective Bargaining?

Livingston (1967) argued that many faculty unionists consider collective bargaining to be the best way of recovering and revitalizing professional ideas which have been corrupted and distorted. In order to pursue this contention we must have some idea of what collective bargaining is. Kerr (1972) defined it as a process of decision making. McHugh (1970) saw it as the combination of two fundamental elements: the act of negotiation in actual bargaining sessions and the more informal relationship created during the implementation of the contract. McHugh further reasoned that collective bargaining typically involves problem-oriented consultation between the parties and administration of the grievance system.

Yoder (1962) defined collective bargaining as a process in which employment conditions are determined by an agreement between representatives of an organized group of employers and an organized group of employees. Yoder emphasized that "collective" is used because employers and employees form associations to act as their agents. In other words, as a result of representation, employers and employees act as groups rather than as individuals. Yoder explained that "bargaining" is used because of the proposal-counter proposal methods used in reaching an agreement.

Blackburn and Bylsma (1970) reported that one major finding of their study of six community colleges using collective bargaining over a six-year period was that the resulting bureaucracy was more representative but more tightly structured. They also found that definitions and rules for both administrators and faculty were more specific and that impersonality in faculty-administrative relations was greater. It is interesting to note also that more administrators per faculty member existed after use of collective bargaining.

Lozier and Mortimer (1972) indicated that approximately 22 states have either passed legislation compelling public institutions to recognize duly chosen bargaining agents, or have passed legislation which does not specifically prohibit bargaining with public employees. Enabling legislation does not require collective bargaining, but it does remove many of the barriers which prohibit it. An additional 10 states have laws which support bargaining for certain categories of employees. At the present time, Kentucky has no such legislation. Although 1972 House Bill 364 was an attempt at such legislation, it died in committee, leaving no effective prohibition against the organization of public employees. They may join a union if they wish.

Lozier and Mortimer (1972), in reference to private institutions, pointed out that in 1970 the National Labor Relations Board filled the void in state legislation by assuming jurisdiction over private post-secondary institutions with gross revenues in excess of one million dollars.

Development of Collective Bargaining in Higher Education

In discussing collective bargaining in higher education, it is important to see how it began in the first place. Schmidt, Parker, and Repas (1967) reported that collective bargaining began in private industry at the end of the nineteenth century with the organization of the American Federation of Labor in 1886. The National Labor Relations Act of 1939 required employers in private industry to collectively negotiate with their employees. This law made it illegal for companies to have personnel policies forbidding collective negotiations with employees' unions. Schmidt, et al., pointed to two factors having a sizeable effect on collective bargaining: the power of some unions to force concessions from employers and the acceptance by some employers that employees should have a part in decisions about working conditions. Collective bargaining continues to grow in industry today, but our purpose is to look at collective bargaining in terms of education, particularly higher education. Schmidt, et al., reported that the major development causing collective bargaining to become important in education occurred in December, 1961, when the United Federation of Teachers was recognized as the chief bargaining agent for public school teachers in New York City. Other cities, such as Milwaukee, Detroit, and Cleveland, followed this trend, and collective bargaining increased in the public school system.

Moore (1971) pointed out that collective negotiations began in the public school system and spread to higher education, with the most important development being in the two-year colleges. McHugh (1969) pointed to the development of the New York Fair Employment Act in 1967, known as the Taylor Law, which granted public employees the right to organization and representation. Blackburn and Bylsma (1970) referred to the 1965 Hutchinson Act in Michigan, which also gave public employees the right to organize and bargain collectively and was the first to have an effect on the community colleges. McHugh (1969) stated that the Taylor Law was established to cover the State University of New York and the City University of New York, and that community colleges in New York were expected to organize and participate in collective bargaining without exception.

Millett (1972) mentioned that a primary reason why collective bargaining developed first in higher education in the community college was the influx of community college teachers from the ranks of public high schools. Moore (1971) gave further reasons why community colleges led the way in getting collective bargaining started in higher education. He indicated that community colleges were founded upon an open, liberal philosophy in which progressive attitudes replaced traditional attitudes. These latter are defined, with an analogy to Thorstein Veblen, as the existence of a feeling among faculty members that it would be a moral question to consider their salaries as wages alone. Moore contended that collective bargaining was stifled in the traditional atmosphere but encouraged in the progressive community college atmosphere.

Jacobs (1972) indicated that there are five characteristics common to community colleges that are not common to other institutions: the lack of academic tradition, the abundance of secondary school teachers, the organizational structure which is similar to public high schools, the lack of clear responsibilities for faculties, and the lack of professional mobility. He pointed out that these characteristics to some extent account for the popularity of collective bargaining in community colleges.

Moore's (1971) studies of characteristics of community college faculty who favored collective bargaining found that these faculty members tended to be male, relatively young, liberal in political ideas, non-protestant, of low faculty rank, and without tenure. Other characteristics were backgrounds in non-science fields, teaching mostly in transfer curriculum, high school teaching experience, and membership in a local union. Moore also pointed out that four-year college faculties have had more participation in decision-making than faculties of two-year colleges. The absence of a good amount of participation in decision-making seems to explain why the community college faculties tend to feel that they have no power and in turn favor collective bargaining.

Other causes for faculty interest in collective bargaining are discontent over salaries, younger faculty's concern with the present rather than the future, a growing sentiment of opposition to merit pay, the existence of statutory support, and the general authority crisis which exists in society and on campus. Boyd (1971) indicated that universities are like marriages in that continued happiness depends on not asking certain questions. Boyd further emphasized that there is no substitute for collective bargaining and that only through it can true professional status be obtained.

Collective bargaining, then, originated in private industry, entered the field of education through the public school system, and rose to all of higher education through the junior college movement. With this background concerning the development of collective bargaining, it is informative to examine more closely the three major bargaining agents.

These agents are the American Association of University Professors (AAUP), the American Federation of Teachers (AFT), and the National Education Association (NEA). The AAUP was established in 1915 and has been primarily concerned with matters relating to academic freedom and tenure. The AAUP has, until recently, been hesitant to become involved in matters of collective bargaining and has specifically refused to endorse the use of the strike as a possible means of securing faculty improvements. The chief weapon of the AAUP is the blacklisting of noncooperating institutions. The AAUP has never been popular in the community college setting, as indicated by Monroe (1972), primarily because the community college faculties have in the past been more concerned with such issues as salary and fringe benefits rather than academic freedom and tenure.

The AFT was organized in 1916 as a part of the American Federation of Labor and received a separate charter from the AFL in 1919. Monroe (1972) pointed out that the AFT has not grown like its rival, the NEA, but it has come to be known as the most militant of the bargaining agents and does not hesitate to use organized labor's weapons of boycotts, pickets, and strikes in order to gain benefits. Monroe indicated that two basic groups of teachers tend to favor the AFT. One group is the left-wing, radical group of teachers who favor social reform and use the AFT as a means to give outlet for their feelings. Another group is the teachers who are faced with extremely inadequate working conditions.

The NEA has traditionally been looked upon as a high school organization since it began its first work in the public school systems. In order to become involved in the two-year college development, the NEA formed the National Faculty Association of Community and Junior Colleges. Monroe (1972) pointed out that this organization appeals more to the conservative faculty members and to those originally from high school ranks who do not want to be further associated with the NEA. However, with the pressures from the AFT, the NEA has come to endorse more strongly such actions as strikes and court injunctions.

A study by Rodgers and Smart (1972), which distinguished between community colleges associated with the AFT and those associated with the NEA, pointed out that community colleges associated with the AFT tend to have a higher percentage of faculty with earned doctorates, to charge higher tuition rates, to have larger library holdings, and to be more selective in their admission policies. As a result of these findings, Rodgers and Smart indicated that it is feasible that faculties of community colleges having the AFT as bargaining agents compare themselves to professors in four-year institutions, while faculties of community colleges have the NEA as bargaining agents associate their standards with those of public school teachers.

According to Lozier and Mortimer (1972), as of May, 1972, formal recognition had been granted to faculty associations on 254 campuses comprising 167 colleges and universities with 15 percent of the country's faculty involved. These are the only situations in which formal recognition has been granted; in many other institutions faculty associations meet and discuss conditions and terms of employment with representatives of the board. The movement toward collective bargaining is gaining strength every year. Many people feel that collective bargaining and unionization are synonymous. However, this is not true, since unionization is not absolutely necessary for collective bargaining to be fruitful. The writers now turn to some opposing views on unionization.

Views on Unions

It is interesting to look at the opinions of three spokesmen—Harry Marmion, Bertram Davis, and Israel Kregler—who have opposing views on the topics of unions, the AAUP, and the AFT.

Marmion (1968) gave specific stances which most unions take. For instance, in the realm of academic freedom, unions oppose any kind of loyalty or disclaimer oaths. Marmion pointed out that the AAUP limits academic freedom in denominational colleges by allowing these colleges to voice restraint in the teaching of controversial subjects. In regard to tenure, he indicated that unions desire tenure status to be given to any full-time faculty member after a three-year probationary period instead of AAUP's recommended seven-year period. Also, unions tend to ask for specific salaries and the abolition of the rank of instructor. AAUP has never specified salary and has never called for the instructor rank to be discontinued. Unions tend to advocate undergraduate teaching loads not to exceed nine hours per week and graduate teaching loads not to exceed six hours per week. Marmion also pointed out that some agencies existing in education and other fields are essentially unions now. He did mention, however, that an institution having a strong faculty senate really has no need for collective bargaining.

Davis (1968) reacted strongly to Marmion's opinions, questioning Marmion's contention that the union represents the faculty more than the AAUP. Davis pointed out that the AAUP fought successfully against the National Defense Education Act (1958) which supported disclaimer oaths. He argued that the AAUP has been more effective in halting the rise of disclaimer oaths than any other organization except the American Civil Liberties Union. In his arguments in support of the AAUP, Davis made it clear that faculties have collectively bargained for a long time and have done so with great success. Davis accused Marmion of implying that negotiations through an external agent as the sole representative of the faculty is the only meaning of collective bargaining. Davis insisted instead that few goals exist which the faculty cannot accomplish itself.

Responding to Marmion and Davis, Kregler (1968) pointed out that the AFT has had a history parallel to the AAUP and has always had college professors as members. He indicated that we should face the fact that professors are not institutional officers but are professional employees. By using this argument, Kregler justified forming unions and practicing collective bargaining in order to maintain a desired balance of power between employer and employee. Kregler accused the AAUP and administrators of educational institutions of creating a myth that collective bargaining and unions cause an adversary relationship between the administration and faculty. He pointed out that unions do not ordinarily conceive of the administration as an enemy.

Kregler accused the AAUP of spending too much time on combatting collective bargaining and urging the use of faculty senates instead of bargaining agents. The AFT, Kregler pointed out, agrees that some union practices do not belong in the academic area. Kregler opposed the closed or union shop clauses on the grounds that faculty members should not be required to belong to a union. As far as strikes are concerned, Kregler took the position that the right to strike may reduce the number of strikes. He pointed out that the amount of time lost from strikes is less than one per cent of total working time, or less than the amount of time lost for illness and coffee breaks.

Kregler pointed to several distinctive AFT features. For instance, the AFT is composed of autonomous unions. The AFT has been fully racially integrated and has been very outspoken in the struggle for civil rights. It has a public review board acting as an ombudsman and insists upon published salaries ranging from $10,000 to $30,000 in 1968. Kregler argued that the AFT recommends loss of accreditation if academic freedom of students and faculty is violated. He also pointed out that the AFT has favored merging with the AAUP, but the AAUP has always refused to do so.

Legal Implications of Collective Bargaining for Higher Education

What are the legal ramifications of collective bargaining for higher education? Let us examine some of the aspects of the situation Ferguson (1968) indicated that simple familiarity with labor relations in the private sector and in the industrial area is just a step in dealing with similar problems in university settings. He pointed out that there are new and evolving concepts present in the labor relations field of higher education with which one must be familiar if he is to be successful as a university consultant. There are several differences between the typical industrial management-labor situation and the university situation. The most apparent difference pertains to the categorization of personnel involved. In the typical industrial situation, Ferguson argued, the sides comprising the bargaining session are usually confined to the employers, employees, union, and possibly the customers. In the university field of labor relations, the sides comprising the bargaining session include the board of trustees or its counterpart, administration, faculty, students, alumni, non-academic employees, commercial customers of the university, and possibly the parents of the students and the public at large. The relationship of the above groups to the industrial and educational settings are entirely different, even though a reasonable analogy may be drawn between the similarities of the groups themselves.

Ferguson (1968) continued his distinction of the industrial and educational situation by indicating that collective bargaining in industry assumes certan sanctions which make it work and does not have just the sanction of a strike. Whereas industry might experience a lock out, it is important that services to students continue. Higher education is service oriented, but service in industry in general is not so apparent. In industry, use is made of allies and work is sometimes farmed out to other plants or companies. It is evident that universities cannot farm out students to other institutions. Mutual assistance pacts are often used in industry to tide over a company during labor disputes. We must remember that in industry the name of the game is profit, while in higher education it is service. Ferguson put it nicely when he stated, "The view is ventured that the consequence of delay in the educational process of students ought not to be equated with the loss of profits to an industrial concern" (p. 780).

A vital legal implication in the area deals with the question of within whose jurisdiction the bargaining takes place. Ferguson pointed out that it appears that when public professional employees take positions on public issues, they are trying to usurp the power of the legislature in being the final arbiter on matters of public policy.

In the case of *The Communications Workers of America v. Arizona Board of Regents* (1972) the Court of Appeals ruled as follows:

> The board of regents is prohibited from entering into a contract, with a union, which would deprive the board of power to make decisions, mandated by statute, to appoint and employ such employees it deems necessary, to determine salaries of persons appointed and employed and to remove any officer or employee when in its judgment the interests of education in state so require, and that the board *cannot* be compelled to recognize a union and to bargain with a union, *unless* the legislature so provides (498 *Pacific Register* 2d 472).

Along a similar vein, the Kentucky Attorney General's Office issued an opinion on May 3, 1972, to the Attorney for the Kentucky State Fair Board in regard to union recognition as the bargaining agent for state employees. The opinion reads as follows:

> It is our opinion that unions may not be granted exclusive recognition as the bargaining agent for state employees. KRS 336.130 which guarantees employees the right to organize and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment was last year held by the Court of Appeals as inapplicable to public employees [Jefferson County Teachers' Association v. Board of Education, 463 *South Western Register* 2d 627 (1971)].

The preceding instances all deal with public employees and institutions. What about private institutions? In 1970, departing from tradition, the NLRB elected to enter the field of higher education in the private sector. In the Cornell University case it decided to assert jurisdiction over the University in its relationships with nonacademic employees. The NLRB has since ruled that it will assume jurisdiction over private educational institutions which have at least a million dollars of annual revenue for operating purposes. In 1971, the NLRB in the Fordham University case assumed jurisdiction over faculty (Jacobs, 1971).

It should be noted at this point that the federal government has not yet extended NLRB jurisdiction to public employees. A fundamental constitutional principle is involved here. The principle of preemption must be considered in the constitutional conflicts between the federal government and state governments. In some instances, the federal government may take jurisdiction of an issue and preempt that issue from treatment by a state legislature. For this reason the NLRB has not become involved in matters of a public nature.

Models of Collective Bargaining

The writers feel that it is important to deal with alternatives to collective bargaining and to give examples of some different models of collective bargaining. Williams (1968) discussed the industrial model of collective bargaining and how it might pertain to higher education. He indicated that faculty governance disappeared in the twentieth century because universities were founded by trustees instead of a community of scholars, and there has been a strong demand for autonomy. Williams pointed out that the trend has moved back toward more faculty control for three reasons. First, trustees have generally been drawn from a more highly educated population and are concerned with academic freedom. Second, with an increase in the scope and complexity of the curriculum, the need for faculty advice has increased. Third, there has been an increased demand for greater autonomy on the part of faculty members. Williams then suggested that there is no question that faculty members will participate in governance in the future, but the question lies in what form their participation will develop. He projected that if academic management will not change, a form similar to that found in industrial relations will begin to materialize.

Wynn (1970) contrasted two models of collective bargaining. He described the traditional role and then developed a semantical approach which he called "collective gaining." An outline of this proposal follows:

	Bargaining	*Gaining*
Motivation:	Reprisals; rewards	School improvement
Agenda:	Demands; counterproposals	Problems
Scope of negotiation:	Vigorously contested	Virtually unrestricted
Session:	Closed to outsiders	Open to outsiders
Size of team:	Small	Large
Spokesman:	One	Multiple
Position:	Intransigent	Flexible
Resistance point:	Obscured	Revealed
Communication:	Deceptive	Clear
Mood:	Hostile	Empathetic; friendly
Weapon:	Power	Knowledge
Impasses:	Frequent	Rare
Result:	Compromise; both win; both lose	Creation; both gain

The writers feel that the "collective gaining" model is very good if the bargaining situation is such that this type of rational, peaceful persuasion technique will be successful. However, it would seem that few bargaining situations would be apt to lend themselves to the above model.

Stevens (1971), who felt that there is little reason to become involved in collective negotiations if conventional senate-type situations are working well, pointed to a system in effect at the University of Scranton. Here, a professional negotiating team is referred to as the faculty council and is composed of three faculty members who are officers in the local AAUP chapter and two elected faculty members. Collective bargaining is considered a voluntary agreement and is not based on legal obligations. One administrative official at the university felt that the faculty should be aware that collective bargaining has its limitations. He indicated that there is no automatic way to put the financial interest of the faculty above the interest of the university.

Given all of the preceding elements, collective bargaining within the sphere of higher education appears to be well established and headed for a long life.

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FACULTY CONTRACTS

by
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The literature in higher education is rather sparse on the subject of faculty contracts. The topic is closely related to two others which are developed in this publication: academic freedom and tenure, and collective bargaining. Faculty contracts may be seen, on the one hand, as the end result of collective bargaining procedures or, on the other, as an alternative to tenure systems in institutions of higher education. The purpose of this paper is to review faculty contracts in the context of both of these perspectives and to consider some basic legal questions related to contracts. Finally, the writer will review what appear to be the two major substantive issues surrounding faculty contracts. These two issues are the pros and cons of contract systems versus tenure systems and the issue of faculty as professionals and/or as employees.

Furniss (1972), writing in a recent document prepared for the American Council on Education, discussed the results of a survey of institutions of higher education in this country and indicated that 94.7 percent of faculty are in institutions that have tenure systems as contrasted to contract systems. He went on to describe some of the significant personnel practices that characterize each of these two systems.

Tenure systems generally had personnel practices that are characterized by the following:

1. At least an initial period of short-term contracts
2. A high rate of award of tenure after the final review
3. No limitations on the percentage of tenured faculty
4. Maximum probationary period of three to seven years with prior service credit awarded in two-thirds of the institutions surveyed

Institutions with contract systems had the following significant personnel characteristics:

1. A high rate of contract renewals
2. Provision for written reasons for non-renewal of contracts

Probably one of the more significant findings of the survey was related to the question of whether institutions were considering a review of their tenure systems. Based on some of the current realities in higher education, i.e., dwindling financial resources, surplus of faculty in some fields, and a stabilizing or reducing of faculty and staff, a large percentage of the institutions indicated they intend to review their tenure systems. Of all institutions surveyed, 43 percent indicated that their tenure systems were under review. In the public four-year institutions, 48 percent indicated that the tenure system was under review, and, rather surprisingly, 54 percent of the private four-year colleges are reviewing their tenure systems.

Another possible reason for the revision of tenure systems at this time is the emergence in discussion, if not in actual practice, of collective bargaining and of the end result of collective bargaining—contracts. Since collective bargaining has been fully explored elsewhere, this paper will briefly review some of the components and critical questions relative to collective bargaining that directly color any discussion of faculty contracts.

Howe (1970) indicated that the number of colleges and universities at which collective bargaining techniques are used would grow. He went on to suggest that there are at least three positive aspects of collective bargaining that would militate toward its increasing use:

> 1. Collective bargaining appears to be the most effective means to effect the resolution of differences of opinions between employer and employee concerning matters of common interest;
> 2. It is the procedure most likely to produce mutually satisfying agreements when employed in good faith;
> 3. It creates at least the potential for a balance of power situation in which differences can be more equitably resolved.

Howe also discussed some of the "devices, techniques, and procedures" (p. 2) of collective bargaining and indicated that "it means arrival at a master agreement, a new relationship, more formal, less paternalistic, more legalistic, more bilateral, more direct, but not necessarily less flexible" (p. 3).

In responding to criticisms regarding the tendency in collective bargaining toward seemingly emphasizing the adversary relationship, Howe pointed out that "the legal profession has demonstrated that adversary relationships can be conducted with mutual respect between the adversaries and with productive outcomes emanating therefrom" (p. 4).

Advocates of collective bargaining for higher education assume what for many is a highly debatable question. That is, are faculty and administrators in an employer-employee relationship or is the relationship something else that would suggest the adversary relationship of collective bargaining is inappropriate for higher education? The attempts to answer that question have brought out a good deal of heated debate in the literature, with answers arrived at more on the basis of ideology than on facts:

> The American Association of University Professors is deeply committed to the proposition that faculty members in higher education are officers of their colleges and universities. They are not merely employees (AAUP, 1968, p. 157).
>
> Some professors insist that there is no similarity between employment conditions in higher education and in other fields. This is an ideological preconception, not an empirical fact. . . . Most professors fail to understand the distinction between an employment problem and a professional one. Employment problems should be resolved within the context of employer-employee relations; professional problems are those appropriate for action by a professional organization independently of employer actions (Lieberman, 1969, pp. 43, 55).

Thus, the lines in the issue are rather sharply drawn, and the individual faculty member makes his choice. In so doing, he opens himself to all levels of criticism, no matter where he places himself in the argument. At the same time, there is an element in the argument that provides some point of consensus, at least in principle, while again bringing about differences of opinion concerning operation. This element is the question of representation of faculty. In general there are three broad systems of representation:

1. An internal mechanism, such as the councils and committees that exist in many institutions of higher education;
2. An outside agent representing the faculty, such as the AAUP, AFT, NEA, or the AAHE; and, finally,
3. An external organization acting as a collective bargaining agent, i.e., unions.

The most commonly used type of faculty representation is the faculty senate, which, in essence, is a type of employee council. The limitations of faculty senates are numerous and relate to the lack of funds that senates have for their operation that are independent of the administration of the institution, the fact that the representatives on faculty senates are directly under the control of the administration of the institution (the employer), and the lack of services needed for effective representation, e.g., experts in negotiations, legal services, accounting services. Finally, faculty senates have no provision for appeals procedure outside the structure of the institution itself.

Duryea (1973) analyzed the initial 14 contracts which have emerged out of collective bargaining in four-year colleges and universities and identified the following five areas as predominant issues in collective bargaining:

1. The constituency of the bargaining association, e.g., are department chairmen, part of the faculty or part of the administration?
2. Provisions for salaries, fringe benefits, and working conditions
3. The rights and privileges of the bargaining association
4. Personnel policies, including grievance procedures
5. Provision for faculty participation in governance of the institution

The author pointed out two primary areas of significance in this analysis of contracts. First, the definitions of constituency of the bargaining units include a wide range of non-teaching professionals, and in the future this will require compromises within the units. This, in turn, will directly effect the direction of collective bargaining and the resulting contracts. Secondly, contracts codify and specify procedures for faculty and administrative relations in a wide variety of areas and tend to put in writing the normal practices of the institution. At the same time, notably in grievance and appeals questions, they institutionalize a new set of procedures and rights. Duryea (1973) pointed out that "contracts give legal status to what may have been informal practices and extend this status to new areas" (p. 129).

The writer will not attempt in this paper to go into any of the rather lengthy discussions, both pro and con, regarding tenure systems, but will present a brief outline of what several authors have suggested are the advantages and disadvantages of contract systems. While these discussions toward contracts as the most significant alternative that has been suggested. have often been presented as a contrast to tenure systems, they are directed Probably the most extensive work that has been done in reviewing these discussions is that of the Commission on Academic Tenure in Higher Education (1973).

The advantages suggested for contract systems are as follows:

1. Contract systems commit faculty to the institution, while the tenure system tends to be described as a "one-way commitment" in which the faculty member is allowed to leave when he chooses.
2. Contract systems would increase the role of administrators with personnel members.
3. The contract permits greater flexibility in institutional planning, budgeting, and program development.
4. The contract is conducive to educational flexibility in that it enables appointment of faculty who meet current educational needs of the institution.

The following points are suggested as disadvantages of contract systems:

1. Faculty members, all of whom are on temporary contracts, vote for each other in the renewal or non-renewal of contracts. Thus, there may tend to develop a system whereby faculty vote for other faculty on the basis of it improving their own chances to have their contracts renewed, or, on the other hand, they vote against other faculty as a means of eliminating competition.
2. Contract systems would increase the role of administrators with personnel decisions more exposed to the constant pressure of self-interest. This would tend to encourage further polarization of faculty-administration relationships.
3. Contract systems induce a prolonged exposure to the uncertainties of contract renewal, and this would have damaging effects on faculty morale and performance. Probationary periods cause anxiety, and while the probationary period in tenure is fixed, this is not so in contract systems.
4. It is not reasonable to expect that contracts will produce better teaching, particularly in relation to the system of evaluation set up in contract systems.
5. Contract systems are not necessarily conducive to innovation among faculty.
6. Contracts are questioned on the basis of whether or not they actually provide more flexibility in institutional planning, as faculty terminations might be based on seniority rather than institutional needs.
7. Contract systems will not really protect academic freedom, and due process procedures are not in existence in most institutions that have contract systems.

In essence, then, the individual's position regarding the use of faculty contracts tends to be based on where he stands in relation to the underlying ideological questions. It would appear that contracts are at least a viable alternative to tenure systems and in some instances more appropriate and effective. In addition, the heat developed from the discussion of academics has produced (much in contrast to historical precedent and common mythology) some significant amount of light—both on contracts and on tenure. Perhaps this light will help to correct some of the deficiencies in the relationships between professors and their places of employment.

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AFFIRMATIVE ACTION PROGRAMS: EXPLANATION AND IMPLICATIONS FOR HIGHER EDUCATION FROM THE LEGAL PERSPECTIVE

by

Janet Hilliker Portig and Barbara Genelle Smith

Is There a Need for Affirmative Action Programs?

Establishing a need for affirmative action programs within a social, an ideational, and an intellectual context will be the first and the all-encompassing objective of this report. From this identified need an explanation of affirmative action programs will be developed, culminating in the implications that affirmative action legislation will have for higher education. The reader should bear in mind that all minority persons are protected by affirmative action programs, though the particular focus of this paper will be upon women as a significant minority group in higher education.

That discrimination against women in higher education is not a phenomenon like campus unrest that undergoes periods of dormancy and then periods of flaming urgency is amply documented in Chapter 11 of the *Report on Higher Education* (Newman, 1971), entitled "Barriers to Women." The analysis of the barriers to women is predicated on the social mission of higher education to support and to foster tolerance and understanding among the populace, especially among those persons within academe itself. The writers' findings were as follows:

> Yet with regard to women, colleges and universities practice a wide range of discriminatory practices. These institutions view women primarily as wives and mothers and their education as preparation for these functions (p. 51).

This view is the product of socially accepted attitudes, and it is in these attitudes that Newman and the task force pinpointed and emphasized the need for changes:

> It is becoming apparent that the prevailing view of women's appropriate role in society has been based on ignorance and misunderstanding, on a failure to think of women as individuals with intellects which need stimulation and egos which need satisfaction, as among men. We are belatedly realizing that when women's minds are awakened by an excellent education, they are not going to be completely fulfilled by merely being gracious shadow-figures for their husbands, if they choose to marry. Lack of outside, independent interests often has a detrimental effect on the husbands and children of able intelligent women as well as on the women themselves. As with minorities, the corrosive effect of repression and lack of opportunity for women goes far beyond the individual (p. 56).

Going beyond the individual woman to the society in which she lives extends the responsibility of higher education "to play an exemplary leadership role . . . to lead the effort to understand and rethink the role of women in American society" (p. 81). For it is precisely through this effort to *understand* and *rethink* that changes in society's attitudes toward and assumptions about women will occur, that the barriers to women can be reexamined and systematically razed.

The most basic understanding that will be needed to change attitudes and to raze barriers involves a woman's identity and her own intellectual grasp of her identity. When a woman thinks or says "I," what does she mean? The first-person singular pronoun and its possessive form, "my," are the core of any concept of identity. How is this ego-center thought of by a woman? One of the most illuminating articles on the psychology of a woman's identity appeared in the inaugural issue of *Ms.* magazine in the spring of 1972. Entitled "We Are the Crazy Lady and Other Feisty Feminist Fables" and written in the first person by Ozick, novelist, essayist, poet, and translator, this article zeroed in on the pronoun "I" and attempted to debunk the fable that a woman's "I" is a function of her hormones, her biological and physiological chemistry.

The moral of Ozick's article—"defamation is applied research"—is a restatement of the sentence concluding the first paragraph: "In the instant one is in possession of one's humanity most intensely, it is ripped away" (p. 40). To the extent that any person can possess humanity or an identity that is defined by a criterion alien to that person is the subject of Sayers' essay, "If Maleness Were the Criterion" (1972). This approach to understanding and rethinking the role of women in American society might bring to men the same shock of recognition, the same "click" of realization that is brought about in women by Ozick's approach. Both writers have tried to convey the alienation felt by women whose sense of self is regulated by an idea of what she should be, rather than by a thoughtful consideration of who she is.

Of course, how a woman thinks of herself is also affected by her society's ideational concept of her role. The intellectual and motivational parameters of a woman's selfhood are extremely important considerations for anyone involved in the education of women. If a woman accepts society's definition of her intellectuality, her motivations to succeed in academic pursuits may suffer. Consider this testimony from the accomplished anthropologist and scholar Mead, which is recorded in her autobiography, *Blackberry Winter* (1972):

> As long as I was in high school, the greater maturity of adolescent girls had not struck me. But in the setting of this co-educational college [DePauw] it became perfectly clear both that bright girls could do better than bright boys and they would suffer for it.
>
> This made me feel that coeducation was thoroughly unattractive. I neither wanted to do bad work in order to make myself attractive to boys nor did I want them to dislike me for doing good work (p. 107).

Mead resolved this conflict for herself by transferring at the end of her freshman year to Barnard where she no longer felt the need to fail in order to succeed.

Most women, however, are not so fortunate as Mead in defining their alienation for higher education as a matter of co-educational versus only-female collegial settings. Most find their college career to be a more-or-less final capitulation to societal pressures for marriage and motherhood. Horner, assistant professor of clinical psychology at Harvard, in her essay "Fail: Bright Women" (1969) has concluded the following from her research on the personality development of women (conducted at both the University of Michigan and Harvard/Radcliffe):

> A bright woman is caught in a double bind. In testing and other achievement-oriented situations she worries not only about failure, but about success. If she fails, she is not living up to her own standards of performance; if she succeeds, she is not living up to societal expectations about the female role (p. 38).

Furthermore, in an article for *Ms.* (Spring, 1972), Horner continues to corroborate Mead's analysis of the need to fail in order to succeed with this statement:

> . . . the desire to fail comes from some deep psychological conviction that the consequences of failure will be *satisfying*. These girls at Michigan were motivated by the opposite; they were positively anxiety ridden over the prospect of success. They were not simply eager to fail and have done with it; they seemed to be in a state of anxious conflict over what would happen if they succeeded ("Why Women Fear Success," p. 50).

Academic success or failure, then, appear to be determined by how able a woman is in accepting the aspirations of her intellectual "I" despite the constraints impinging on her motivations for achievement from the societal "she." Both women and men need to rethink the requirements for intellectual achievement within higher education and the susceptibility of these requirements to social influences, a goal made explicit in this statement from *The Newman Report:* "Achieving equality [and in this context *identity* could be added] for women involves not only specific institutional changes, but also subtle but fundamental changes in attitudes" (p. 81).

What, indeed, is more fundamental than the "I" with which one identifies one's self?

A final example of the need which affirmative action programs can help to fulfill for women with regard to who a woman is, is a personal essay by Rich (1972) entitled "When We Dead Awaken: Writing as Re-Vision." Rich examined her life and her work in the contexts of society, ideation, and the intellect with deeply felt precision and incisive insight. Her thoughts extend beyond the first-person singular to include a vision of what the lives of women *and* men can be if they will awaken to the pains of victimization, intolerance, discrimination, misunderstanding, ignorance, and stereotypical thinking, if they will begin to act affirmatively not just to alleviate these pains, but to protect the present and the future from these pains through prevention and cures. Perhaps affirmative action legislation shows us how to begin that action.

What is Affirmative Action?

In a booklet entitled *Affimative Action: Women's Rights on Campus* (1972), Shulman defined affirmative action as follows:

> A legal doctrine that requires a university, following Federal guidelines, to develop and codify procedures that promote and ensure the equitable treatment of faculty and staff women in employment and promotion, and provide them with fair representation in all aspects of campus activities (p. 1).

Affirmative action affects more than 80 percent of our colleges and universities. Thus, affirmative action has become a priority issue in higher education.

An affirmative action program as defined in Revised Order No. 4a is "a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort" (Shulman, 1972, p. 12).

What Is the Legal Basis of Affirmative Action?

A brief historical review of acts and orders pertinent to affirmative action includes the following:

Equal Pay Act, 1963. This act, administered by the Wage and Hour Division of the Department of Labor's Employment Standards Administration, is the basic "equal pay for equal work" act, but it did not assist women in education since executive, administrative, and professional employees were exempted from its coverage.

Civil Rights Act, 1964. Among other things, this act created the Equal Employment Opportunity Commission (EEOC).

Executive 11246, 1965. This order prohibits discrimination on the basis of race, religion, color, or national origin.

Executive Order 11375, 1967. This order bars federal contractors from discriminating on the basis of sex. According to Sandler, as reported by Shulman (1972):

> In January 1970, the Women's Equity Action League filed a class action complaint with the U.S. Department of Labor against all colleges and universities covered under the Executive Order, an action that eventually brought Federal investigators onto college campuses (p. 3).

This order was the only legal remedy available to women, and as such, is the "impetus behind the current affirmative action activities on campus" (Shulman, 1972, p. 3).

Revised Order No. 4, 1971. This order implements Executive Order No. 11246 as amended (11375). Shulman (1972) stated that it "details the information all Federal contractors with 50 or more employees and contracts totaling $50,000 or more must include in their written affirmative action programs" (p. 11). This order places greater emphasis upon sex discrimination than the original one did, and it expects that employers will come up with "a separate utilization analysis and goals and timetables for women" (Shulman, 1972, p. 11). Revised Order No. 4 assists public institutions which do not have to have written affirmative action plans on file by indicating criteria that must be met for compliance with affirmative action.

Equal Employment Opportunity Act, March 24, 1972. This act serves as the second legal remedy that women have available. The act amends Title VII of the Civil Rights Act of 1964 to include all educational institutions within its scope (both public and private) and gives added enforcement powers to the Equal Employment Opportunity Commission (EEOC). Edwards (in Shulman, 1972) stated that ". . . whatever doubt previously existed, Title VII (as amended) establishes a national policy against sex bias in employment which is both absolute and binding on the university" (p. 9).

Higher Education Act. June 23, 1972. This act provides women with their third and fourth means of seeking redress. The act prohibits discrimination on the basis of sex in any educational program or activity receiving federal aid and extends the 1963 Equal Pay Act to cover executive, administrative, and professional employees.

Guidelines for Affirmative Action, October, 1972. These guidelines explain how the Office of Civil Rights will apply Executive Order 11246 as amended and Revised Order No. 4.

How Have Institutions of Higher Education Responded to Affirmative Action?

Generally, the response of universities and colleges across the nation to affirmative action legislation could be characterized as slow-to-active, as defensive-to-constructive, and confused-to-organized, or as paranoid-to-rational. In other words, no one institution has taken the lead with all others following, nor has the gamut of responses from emotional to responsible lacked a representative. The climate is one of watchfulness, some activity, more suspicion. Two approaches to becoming responsive and responsible implementors of the laws will serve as barometers of the nation: Wesleyan University and the University of Wisconsin.

Wesleyan University became involved with the development of an affirmative action program in the spring of 1970 due to the efforts of a small group (never totaling more than seven or eight) of faculty women and faculty wives. These women initiated a survey of the faculty at Wesleyan University and a study of the utilization of women in positions of responsibility. By May 5, 1970, they presented to the president a statement, entitled "Hiring Women at Wesleyan: A Program," calling for reforms in the University's hiring practices. The results of their survey and study had shown that only seven percent of the faculty (instructional, research, administrative) were women—22 out of 300, a percentage corresponding to the 10 percent female student population then enrolled. Of the approximately 100 administrators, only five were women, and none of these women held a rank above Assistant Dean.

Deploring this imbalance, the Committee on Women's Employment (1970) stated:

> There is a basic contradiction between coeducation and Wesleyan's male-dominated teaching and administrative apparatus. The University cannot possi-

> bly expect serious intellectual commitment from its women students when it provides them so few role models. Although a coeducational Wesleyan suggests the equal status of men and women, the scarcity of women in crucial University roles refutes the suggestion. Wesleyan is in fact educating its women toward alienation and frustration and its men toward a distorted view of the relationship between the sexes. This is a discouraging prognosis for the healthy, balanced community which the admission of women was supposed to ensure (p. 1).

The program which these few women suggested was taken seriously, and they were allowed to interview women for the position of Associate Provost for Women. Eventually, they hired Sheila Tobias, who has been quite active in improving the situation at Wesleyan, as well as in institutions throughout New England. Through her leadership a project known as HERS: Higher Education Resource Service for Academic Women in New England, was funded in 1972 for two years by the Ford Foundation. The project will survey job openings, the "status of women and minorities on New England campuses, and offer career development services for academic women interested in teaching, research, and administration on the community college or college or university levels" (Committee for the Concerns, n.d., p. 1).

The University of Wisconsin experience with affirmative action programs provides a direct contrast with that of the Wesleyan experience. The factors of largeness and fragmentation do much to complicate the responses of large universities to the legislation, and in addition to the complications come frustrations and many kinds of bitterness as Bleier (1972) demonstrated in her article, "Women and the Wisconsin Experience."

Bleier does not believe that the University of Wisconsin became "publicly committed to basic change. To the elimination of glaring injustices, yes; but to the kind of change that involves the sacrifice of the clubby comforts of tradition—that is another game altogether" (p. 105).

Ray (1973), Coordinator of Affirmative Action Programs at the University of Kentucky, discussed the only *approved* affirmative action plan to-date from the University of Missouri. It is being circulated across the nation in the form of a leaflet four pages in length. HEW approved this one plan and suggested that other institutions study it. By contrast, Stanford University's plan runs three volumes in length with several statistical appendices. Ray also explained that she is currently drafting the University of Kentucky plan, borrowing from all sources available to her.

Many people would say that institutions are responding slowly. Tinsley (1972) in "An Overview of Class and Individual Action Strategies" reported that, as of April 1, 1972, complaints of a pattern of discrimination have been filed against about 350 colleges and universities, 200 compliance reviews have been started, and there are 136 individual complaints of sex discrimination in higher education in the Office of Civil Rights with 38 currently being reviewed. Also, contract funds have been delayed for about 40 institutions, but in no case to date has any contract been terminated. Perhaps institutions respond slowly when they feel no pressure—intense and constant—to do otherwise.

The University of Texas at Austin has not yet complied with an HEW ruling. The case involves a complaint filed in August, 1971, by Janet Rollins Berry in the Art Department of the University. A brief outline of her case, as reported in her letter to the editor of *The Chronicle of Higher Education*, February 12, 1973, follows:

August, 1971	Individual complaints filed with HEW.
November, 1971	HEW ruled in favor of Ms. Berry and ordered the University of Texas to promote her to the rank of associate professor with salary commensurate to the rank. The University refused to accept the HEW findings and appealed. HEW and the Department of Labor have yet to arrange for a review.
1971-1972	Berry's husband was fired. The original HEW complaint requested protection for him, but now HEW refused to consider his case germane.
June, 1972	Mr. and Mrs. Berry both filed complaints with EEOC. The University refused to turn over relevant records. No punitive action against the University. The University had 18 months to prepare and file an affirmative action plan and failed to produce a satisfactory plan, but no federal funds have been delayed. The AAUP failed to censure the University for failure to comply with federal standards for fair employment practices. The Berrys had to secure an attorney due to harrassment at all levels.

This case appears to illustrate, at least on the part of one institution, a lack of cooperation with affirmative action and a lack of commitment to fair employment practices.

Two examples of action by departments at the University of Kentucky are an attempt by the School of Communications to hire a woman and the increase in women graduate students in the Department of Higher Education. In an interview, Dr. Robert Murphy, Director of the School of Communications, indicated that the School has actively sought and found qualified female candidates for the position of Assistant Professor, and that a woman is among the five now being considered for the position. Dr. Murphy stated that he would like to hire the female applicant due to her background experiences and areas of competence that would strengthen the Department.

The following figures indicate the changes that have taken place between 1968 and 1972 in the male-female enrollment in the Department of Higher Education.

Graduates of the Department of Higher and Adult Education between 1968-1972

	M.S.	Doctoral	Totals by Sex	
Male	9	7	16	62%
Female	9	1	10	38%

Graduate Students Presently Enrolled (12/22/72) in Higher and Adult Education

	M.S.	Doctoral	Totals by Sex	
Male	10	28	38	54%
Female	17	16	33	46%

Some interesting points regarding the availability of graduate programs for women (or the desire of women to pursue graduate education) and the commitment of this Department in the education of women can be found in the above information:

1. Women represented 38 percent of the graduates between 1968-1972, but they now represent 46 percent of the graduate students in the Department.
2. There are now four times as many men enrolled in the doctorate program as have previously graduated from the program between 1968 and 1972—seven men have graduated, and 28 men are now enrolled. But there are 16 times as many women enrolled in the doctorate program as have previously graduated from this program between 1968 and 1972—one woman graduated, and 16 women are now enrolled for the doctorate.
3. These figures may indicate that more women are staying around or coming back for advanced training, and it is especially from this training pool that able women administrators and professors can be drawn. Since selections are made for graduate study on the basis of merit—ability—in this department, it appears that women can and want to succeed if given the opportunity.

Two other important responses to affirmative action deal with administration of the program. One of these is access to personnel records, an area in which HEW and universities have disagreed. HEW maintains that it has the right to full access to personnel records and claims this right under the following statement from Executive Order 11375 (11246 amended):

> The contractor will furnish all information and reports required by Executive Order No. 11246 . . . and by the rules, regulations, and orders of the Secretary of Labor . . . and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and others (Shulman, 1972, p. 7).

The universities fear this unlimited access system in that it might jeopardize the current process of candid faculty evaluaton that is necessary for decisions regarding retention and promotion (Seabury, 1972; Sandler, 1972).

Perhaps the plan of the University of California at Berkeley is best. Worked out with HEW's Office for Civil Rights (OCR), the procedure recognizes OCR's right of access to files but reserves the right to ensure personal confidentiality of files unless the law requires otherwise:

> In turning over records to HEW, the University may delete material that would identify the individuals making evaluations or recommendations. The names of Berkeley campus "deans, department heads, or other supervisors" will not be deleted. When deletions occur, names will be replaced by race, sex and title. If OCR determines that a deleted name must be provided, the University may "seek a determination in any appropriate forum" concerning the need to supply the name (Shulman, 1972, p. 7).

The second area of administrative response has to do with disclosure of goals and timetables. Two universities, the University of Pennsylvania and Harvard University, seem to have an acceptable solution to this problem. They will change their present nondisclosure policy and distribute their plans when they have been notified by HEW that their plan has been accepted.

The "Affirmative Action Fund" at Stanford University is a positive step forward. The fund is used in special instances where a minority group member or female candidate could not otherwise be hired—for example, to hire someone to fill a vacancy that will not occur for another year because of retirement. The "Affirmative Action Fund" can pay part or all of the candidate's salary. Candidates appointed this way receive no special treatment. The fund is to encourage department commitment in seeking minority and female candidates, and the money in the fund is limited to $75,000 in order to discourage departments from counting on it for all recruiting purposes ("Provost Miller Reports," 1971).

What Problems Have Resulted from Misinterpretations of Affirmative Action Legislation?

The following data focused on the problem:

> While 67.6% of the elementary and secondary school teachers are women, only 22% of the elementary school principals and only 4% of the secondary school principals are women. Furthermore, the 13,000 school superintendents, only 2 are women.
>
> The higher the rank, the fewer the women. For example, the last time a woman was hired as a professor in the Department of Psychology at the University of California in Berkeley was in 1924 (Murray, 1971). Yet, women received 23% of the doctorates in psychology at this University. At Columbia University, there is no woman on the faculty of the Department of Psychology although 36% of the doctorates in that field are awarded to women (Sandler, 1970). At the University of Chicago, the percentage of women faculty members is less now than it was in 1899 (p. 8).

The above data appear in "The Role of Government in the Attainment of Equal Opportunity for Women in Universities" written by Walsh and presented at the 138th meeting of the American Association for the Advancement of Science in December, 1971. It details the status of women in education and administration against which the following misinterpretations of the law should be referenced.

The setting of goals and timetables and their implementation have been confused with the filling of quotas. According to the Revised Order 11375,

> Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of appyling every good faith effort to make all aspects of the entire affirmative action program work (Shulman, 1972, p. 12).

In an article entitled "Excerpts from U.S. 'Affirmative Action' Guidelines," *The Chronicle of Higher Education,* October 2, 1972, reported the following:

> Goals are projected levels of achievement resulting from an analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and women and the expected turnover in its work force (p. 2).

The crucial terms in these definitions are *good faith, reasonably, targets, projected levels,* and *analysis of deficiencies.* They focus on allowing universities and colleges to hire personnel on the basis of needs and the applicants' achievements, rather than on the basis of filling vacant job slots.

Goals are to be understood as the probable result of compliance with affirmative action legislation. Quotas would be exclusive and rigid measures of that compliance. Pottinger, former Director of HEW's Office for Civil Rights, distinguished between goals and quotas in an effort to obviate misinterpretations:

> Goals are not quotas, and the difference is not a matter of semantics. Each word has a specific and different meaning in the field of employment compliance. Quotas, on the one hand, are numerical levels of employment that must be met if the employer is not to be found in violation of the law. . . . Their effect is to compel employment decisions to fulfill them, regardless of qualifications, regardless of a good faith effort to fulfill them, and regardless of the availability of capable applicants. Goals, on the other hand, signify a different concept and employment practice. If, for example, an institution has been deficient in training, upgrading, promoting, or otherwise treating employees without regard to race, color, religion, sex, or national origin, goals are projected levels of hiring that say what an employer can do if he really tries. By establishing goals, the employer commits himself to a good faith effort that is most likely to produce results.
>
> If a university falls short of its goals, that in itself does not result in noncompliance; a good faith effort to achieve those goals remains the test (Shulman, 1972, p. 12-13).

In other words, affirmative action laws require the university to present evidence to show that goals were attempted, not that quotas were filled.

The term *best qualified* and its meaning have been questioned and debated. One writer, Wheeler, is quoted by Shulman (1972) as reporting that HEW's Regional Offices have been "suggesting" that universities "give preference to women and minority applicants who have qualifications higher than the least qualified member of any department which has a job opening" (p. 13). This finding is contradicted by Simpson (1970) who found that hiring officials (deans, department chairmen, e.g.) prefer hiring males, where men and women are equally qualified, so that "prospective academic women must realize that they must be more highly qualified than their male counterparts for positions in higher education" (p. 72).

Sandler in an article for *The Chronicle of Higher Education*, "Male vs. Female: A Bread and Butter Issue" (February 5, 1973), generated a reasonable explanation for this confusion as to quality and the implications for its maintenance in affirmative action legslation:

> There is no intention whatsoever to force university and college employers to hire less-qualified women or minorities. (Note the covert assumption that somehow women and minorities are not "qualified"—no one ever talks about a "qualified *man*," only about "*qualified women*" and "*qualified minorities*.") The employer must make a "good faith" effort to recruit women and minorities, and document what was done. If, after that effort, the best-qualified candidate turns out to be white and male, then that is who is hired.
>
> . . . .
>
> What is at stake is not the hiring of less-qualified persons, but a very real economic threat. For every woman or minority person who is hired, one less white male is hired. There is no way around it (p. 4).

Of course, this issue is directly tied to the first of goals and timetables. It is likely that those institutions which do not distinguish goals from quotas are also those which can be shown to be giving preferential treatment in the quality issue.

The means for determining the extent of the "pool" of job candidates are open to varieties of interpretation and follow-through. Recruiting women actively for job openings is not just a matter of advertising widely as an "equal opportunity employer." From the perspective of HEW and women's organizations, national statistics of the proportion of formally qualified women is 20 percent of the doctorates in many fields, while across all disciplines the percentage is 13.3 (Shulman, 1972). This is, of course, the "deepest" of pools for the purposes of recruitment.

Other institutions have chosen to do their recruiting from a "shallower" pool. The University of Wisconsin defines the pool to include those women with Ph.D. degrees in the field where the job is available from major graduate schools compared with or in ratio to the percentage of women in the junior staff. Stanford's pool is a number proportionate to the number of Ph.D.'s and other advanced degrees which Stanford grants to women.

And some institutions have not considered the pool at all. Shulman (1972) reported that Tufts University, the University of Michigan, and the University of Pittsburgh "do not discuss the problem of defining recruitment pools although they indicate plans for affirmative action hiring of women and minorities" (pp. 18-19).

The organizational units within the college or university directly responsible for the establishment of goals and timetables have been interpreted in three different ways: as the entire university, as the individual divisions or schools within the university, and as the individual departments. Of course, most advantageous to women is the designation of the individual departments as the units to be directly responsible to affirmative action legislation:

> When goals are set for a unit larger than a department, such as the Faculty of Arts and Sciences, discrimination may exist in one department while fair practices occur in another. The goals for the "unit" may then be reached, but the rationale for setting goals—to ensure nondiscriminatory practices—will not have been achieved (Shulman, 1972, p. 19).

This problem also brings to light another with regard to projecting goals for hiring; often these goals are projected solely on the basis of "new hires," largely because the numbers of women in senior ranks is difficult to determine from the available pool of recruits. If departments or higher units set goals only in terms of the number of new hires, this may give an institution "more flexibility on a yearly basis, given the turnover and financial constraints in any particular department" (Shulman, 1972, p. 20), but this criterion may also conceal the fact that women and minorties are being terminated or not promoted.

Clearly, establishing the unit to be responsible for all of the ramifications of the implementing of a plan for affirmative action is not the end of a laborious process, but only the beginning. Each of these misinterpretations will be the burden of whichever unit is designated and the way through the myriads of problems is fraught with varieties of temptations to that unit's "good faith." Observing and being involved in the pilgrim-elect's progress will be enlightening and instructive to administrators and legislators of affirmative action alike!

What Are the Implications of Affirmative Action for Institutions of Higher Education?

Affirmative action is, first of all, as Sandler described it, a bread-and-butter issue. It will affect an institution's policies regarding nepotism, part-time employment, retirement benefits, maternity leaves, and may even require the institution to provide restitution to its female and minority faculty members in back pay. According to Tinsley (1972), one case, the Shelley Thorn Case, will provide women with a precedent for bringing cases to court with a private right to sue under the Executive Order 11246 as revised, and this right is also guaranteed under Title VII, extended to academic women under the Equal Employment Opportunity Act of 1972. As women become more and more knowledgeable about their rights, their recourse to the courts is likely to become more frequent. Thus, it is incumbent that higher education begin to be sensitive to and responsible for the plight of its women. This plight has been amply documented in the first section of this paper; the societal role of women is in need of new understandings and rethinkings, and the nation's colleges and universities can have great impact on the changes needed if they will take affirmative action legislation seriously and translate its impetus into determined activities for change. Not only are its faculties and administrators implicated, but also are its students and the policies which higher education generates for the admission and the education of students directly involved in the changes to come.

The legal basis for affirmative action in education is the Higher Education Act of 1972 in Title IX, which provides for sex equality both in employment and in education itself:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance (Scott, 1972, p. 122).

This Act applies to all schools receiving federal grants and loans—preschools, elementary or secondary schools, vocational or professional schools, and both public and private undergraduate and graduate programs. The federal government may withhold funds from any of these institutions found guilty of violating any of the provisions of the Higher Education Act, including Title IX.

The following facts and opinions further evidence the need for affirmative action in education:

1. Although girls constitute a majority of high school graduates, earn better grades, and do better on standardized tests, they are much less likely to go to college. Only one out of four women capable of doing college work, does so, compared to one out of two men (Rossi, 1964).

2. In 1968, women earned 42 percent of bachelors and first professional degrees, 36 percent of masters degrees, and only 13 percent of the doctorates (*Trends*, 1969).

3. In graduate education the same pattern emerges. "In programs beyond the baccalaureate degree in 1967 only 30 percent of the 900,000 students registered were female" (*Handbook*, 1969, p. 190).

4. The largest reservoir of academically talented youth who are not attending college consists of bright, lower-class women: "Whereas 25 percent of the high-ability (top quarter) males from the lowest socioeconomic quarter fail to enter college, 40 percent of their equally able sisters fail to continue their education" (Cross, 1972, p. 5).

5. Between 1950 and 1966, the proportion of 18 and 19 year old males enrolled in higher education increased 20 percent, while the proportion of females increased only 11 percent (Newman, 1971).

Thus, one can see that the emerging pattern is one of a declining proportion of women represented at each educational step, that a tremendous pool of talent has been overlooked, and that colleges and universities can take the lead in changing the attitudes of society—both men and women—and in fighting to end intolerance in our society by giving women equal opportunities in education.

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ACCREDITATION IN HIGHER EDUCATION

by

Saundra Lykins and Shannon Craig

With few exceptions, every individual involved with education will eventually face some aspect of accreditation, regardless of his orientation or area of interest. The all-encompassing nature of the subject makes it a very appropriate topic for study and discussion by administrators and faculty in higher education.

The prime objectives of this paper are to acquaint and familiarize educators with information relating to the following topics:

1. Historical development and present status of accreditation
2. Problems and issues of accrediting agencies
3. Legal status of accrediting agencies
4. Cases litigated and forms of relief that have been or might be employed
5. Implications for the future

In the process of meeting the previously stated objectives, an attempt will be made to present some knowledge on the subject of accreditation. It is hoped that such information will be useful in a pragmatic sense to those interested in higher education.

Historical Development of Accreditation in the United States

Selden (1960) defined accreditation as differentiated from certification or licensure in teacher education. His definition stated that it was "the process whereby an organization or agency recognizes a college or university or a program of study as having met certain predetermined qualifications or standards" (p. 6). This statement would seem to be appropriate for higher educational institutions in general.

Such a definition would incorporate two primary factors: first, that the certifying agency has criteria which must be met by the institution, and second, that the agency makes known to the public those institutions which have met the standards by granting them accreditation.

The United States Bureau of Education was established in 1867 as a department, but was changed to a bureau in the Department of Interior in 1868 in response to the need for differentiating between a college and other types of educational institutions.

In 1910, the office of Specialist in Higher Education was added to the Bureau's organization. At that time, the Bureau sought to delete certain questionable institutions from its list of 602 colleges. To facilitate their removal from the list, a definition of characteristics necessary for inclusion in the list was published, thus establishing the idea of acceptable standards.

In 1911, Kendrick C. Babcock, the first duly appointed Specialist of the Bureau, cooperated with the Association of American Universities to prepare a classification of colleges and universities to aid graduate schools in determining which colleges most ably prepared students for graduate work. This was accomplished by examining the records of students in graduate schools, and classifying the colleges on the basis of the success of their graduates in advanced degree programs (Dickey and Miller, 1972b).

The classification was completed and copies were sent to various college deans for criticism. A revision was then submitted to officials of graduate and professional schools for additional comment. At this time, the news media took notice of the report, and the resulting publicity evoked a tremendous pressure on President Taft not to release the report. He, therefore, requested the Commissioner of Education to withhold publication of the report, a policy which was subsequently upheld by President Wilson (Dickey and Miller, 1972b).

It was finally agreed that the Bureau should furnish data regarding enrollment, offerings, and programs of colleges. It was also decided that each institution should attend to its own classifying of other institutions. A bulletin containing such data about 252 colleges of arts and sciences, along with a suggested list of standards, was then published by the Bureau (U.S.B.E., 1918).

Since that time, no attempt has been made by the Bureau to compile a classified or accredited list of its own. At the present, the Bureau still relies on the judgment of several nongovernmental accrediting agencies.

President Taft's stand on the publication of Babcock's classification shifted the burden of accreditation to the voluntary associations. Babcock's efforts were not in vain, for when he became Dean at the University of Illinois in 1913, he was appointed chairman of the Association of American Universities Committee to classify colleges for pregraduate training. The list was first published in 1914 and was provided to the War Department which used it as a basis for excusing West Point applicants from entrance examinations (Dickey and Miller, 1972b).

Types of Accreditating Agencies

There are two broad categories of accreditation, voluntary and governmental. The designation "voluntary" has been generally used to categorize the accrediting agencies which are not governmentally controlled; however, this terminology has been challenged. Blackwell (1971) said that the function of control of quality of higher education has been delegated to what the courts have erroneously termed "voluntary associations," and Koerner (1971) said that membership in one's regional association is not a live option for a college that wants to survive. In spite of this kind of criticism the term continues in use and, therefore, will be employed in this paper. This section of the paper will be concerned with such agencies.

Accreditation, as applied to education, is the recognition accorded to an institution that meets the standards or criteria established by a competent agency or association (Blauch, 1959). The only power that the accrediting organizations have is that of giving publicity to the lists of institutions they have accredited. Inclusion on the approval list of a nationally recognized accrediting organization is generally accepted as the most significant available indication of institutional quality. It should be pointed out that institutions are not rated by accrediting agencies.

The general purpose of accreditation is to promote and insure high quality in educational programs. More specifically, the purposes are (1) admissions and the maintenance of minimum academic standards, (2) stimulating institutional self-improvement, and (3) serving as a countervailing force to the many external and some internal pressures that are continually being exerted on educational institutions (Selden, 1960).

Voluntary accrediting agencies are of two kinds. First are the regional, of which there are six, The New England, The Middle States, The Southern, The North Central, The Northwest, and The Western Association of Colleges and Secondary Schools. The regional operations extend over clearly defined regions consisting of groups of states, and they accredit an institution as a whole.

Second are the professional agencies and associations that operate on a nationwide basis in the various fields of education for professional or program accreditation. Presently there are more than 30 such professional accrediting agencies and they include such organizations as the American Psychological Association, the American Library Association, the American Bar Association, and the National Council for Accreditation of Teacher Education.

This type of control and standards maintenance, that is, the recognition by a voluntary association composed of its peers that the quality of a degree-granting institution's operation meets certain standards preconceived by the association, is an uniquely American approach. In almost every other country this is a governmental function carried out by the Ministry of Education or an equivalent. American higher education has arrived at this method through a long, chaotic, evolutionary process. Only a few of the highlights will be presented here to provide a framework for discussion.

Perhaps the earliest attempt to compile a list of institutions for "recognition" was that of the Association of American Universities at a time when most American scholars went to Europe for graduate training. Some European universities stated they would accept students from only the few member institutions of the Association of American Universities. In an attempt to circumvent such action, the Association published a list of American institutions it felt should be recognized by the European graduate schools. At a later time the Association in conjunction with the Bureau of Education (now the Office of Education) developed a list of institutions of higher education and rated them according to quality. When the existence of such a list became publicly known, the outcry against publishing it was so great that President Taft refused to let it be put into circulation.

Other educational associations at various times addressed themselves to questions relating to accreditation, such as the transfer of work from one institution to another, and quality control; however, none assumed a leadership role and the void was filled by the organization of the various regional accrediting agencies shortly after the turn of the century.

In 1934, the North Central Association adopted a new plan due to criticism such as that of the then Chancellor of Buffalo, S. P. Capen (Zook and Haggerty, 1936), who said, "I regard the whole standardizing movement in its present form and extent as a menace. If it is not checked and corrected, it will utterly destroy the most precious and the most characteristic quality of American education" (p. 64).

The new plan greatly influenced the philosophy of accrediting and moved it from the policing function of imposing standards based on quantitative criteria, such as the number of volumes in the library and the size of classes, to a developmental function intended to secure flexibility in accrediting activities and stimulate growth and educational quality in institutions of higher education.

The next important development was described by Blackwell (1961) as follows:

> Increasing friction between accrediting organizations and institutions prompted the American Council on Education to hold conferences in 1939, 1940, and again in 1949 to discuss the need for coordination of their activities. In 1950, the National Commission on Accrediting adopted its present organizaiton (p. 57).

The NCA functions as a coordinating body and attempts to assure some degree of uniformity and cooperation between the regional and the professional agencies. It has been characterized as the agency that accredits accrediting agencies.

In 1949, another organization, the National Committee of Regional Accrediting Agencies, was formed. In 1964, it became the Federation of Regional Accrediting Commissions of Higher Education (FRACHE). Koerner (1971) commented that the main reason for the creation of FRACHE was the regional agencies' fear of losing power to the federal government and to the states, possibly resulting from increased public funding of higher education. Dickey and Miller (1972) expressed concern in this area by saying that increasing federal involvement would significantly affect the traditional independence of nongovernmental accrediting agencies and result in the federal government gaining a beachhead in establishing educational standards.

The evolution of public involvement continues. A study completed by FRACHE (Knowles, 1971) called for a new national organization having as one of its purposes the creation of closer ties or relationships with the public.

Accreditation in higher education is carried on almost entirely by voluntary agencies which have no inherent legal power to control the operations of higher education. In practice, however, they have come to exercise a most significant influence upon (1) the choices of students in selecting the colleges and universities they will attend, (2) the determination of acceptability of the product of institutions (for transfer, entering the occupation for which the student has been prepared, or membership in a professional organization in the student's chosen field), and (3) the eligibility for participation in programs sponsored by the federal government (research contracts, loans under the College Housing Program, and distribution of surplus property). Institutions usually do not ignore the standards and criteria set by the accrediting organizations; to do so would quickly bring them into disrepute.

Other implications are that accreditation is necessary for membership in the Association of American Colleges and the American Council on Education. Accreditation exerts a positive influence on the status of a federal employee under the United States Civil Service regulations. Accreditation of programs of study in such fields as architecture, dentistry, engineering, law, and others plays an important part in obtaining the required state license to practice the profession. Grants from foundations and other prospective donors may be withheld from nonaccredited institutions (Selden, 1960).

Voluntary accrediting agencies have no inherent legal authority, but they have become powerful bodies in an area of vital concern to the public. Their ambiguous legal status can be examined by an analysis of the actual and potential judicial and legislative restraints on their activities. This was accomplished in a comment in the *Cornell Law Quarterly* entitled, "The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation," hereafter referred to as "The Legal Status." This analysis involved two basic questions: (1) whether judicial relief is available, and (2) if so, under what circumstances and by what standards?

As private, nonprofit, voluntary associations, accrediting agencies belong to a broad and rather loosely defined legal category encompassing any body of individuals or groups which have united in a somewhat formal structure to effect common goals and purposes.

Although there is a substantial body of authority which purports to affect voluntary associations in general, educational accrediting agencies have certain distinctive characteristics which seem beyond the scope of general association law. At any rate, that law is too broad to be determinate of the extent to which these agencies can be supervised by the courts.

Most accrediting agencies are now incorporated, which has helped to clarify their legal status. However, it does not solve the difficult problems that occur when refusals to accredit and withdrawals of accreditation are challenged, nor does it indicate what substantive law to apply in such actions.

"The Legal Status" assumed that judicial intervention may be warranted based on common-law membership cases, but pointed out two roadblocks which must first be passed: exhaustion of remedies and the lack of a proper remedy. Most accrediting agencies now have procedures for internal appeal, and, in fact, one of the functions of the new national organization proposed by FRACHE would be "to scrutinize procedures of all institutional accrediting bodies to see that they conform with due process and more likely can establish appeal procedures superior to those now generally in existence" (Knowles, 1970, p. 291). "The Legal Status" also suggested possible proper remedies through equity, mandamus, declaratory judgment, and tort action.

In regard to expulsion cases, "The Legal Status" stated that the law of associations does not wholly depend upon the consensual elements of the relation between the member and the group, but such elements may be supplemented, modified, or disregarded according to the function of the particular group in the community. On this basis, because of public concern for and reliance upon accreditation, courts might be more likely to invalidate a disaccreditation which is contrary to the public interest than one which is consistent with it.

On the other hand, the courts may defer to the accrediting agency's interest in autonomy and its special competence in formulating educational standards. The weight accorded these arguments is uncertain, but it seems clear that the court should recognize both and balance one against the other.

In exclusion cases, the court cannot compel the granting of membership in a voluntary assocaition with one major exception. When a private association is the only group operating in an area of vital public concern, it enjoys a sort of monopoly power. If that power, because of public reliance upon it, becomes great enough to make membership a necessity for successful operation in that area, courts may intervene. These factors—monopoly power and public function—may render an accrediting agency's admission policies susceptible to judicial scrutiny; however, since the courts lack the expertise in setting educational standards and formulating policies, they should be reluctant to interfere.

The acceptance of jurisdiction in exclusion cases, then, should depend upon a balancing of three factors: (1) the extent of the accrediting agency's monopoly power, (2) the degree to which that monopoly power is being abused, and (3) the extent to which the accrediting agency is relying on its special competence. When the degree of power and extent of abuse become significant enough to outweigh the deference paid to expertise, courts may justifiably intervene.

Procedural regularity is relevant in testing the validity of any expulsion or exclusion from an educational accrediting agency. Fair procedures may be required of an accrediting agency on three different levels. At the lowest level, courts might insist that an accrediting agency follow its own procedural rules. At the second level, the procedures of the agency should conform to accepted standards of administrative procedure. At the highest level, procedures conforming to the due process clause of the Fourteenth Amendment arguably could be required of an educational accrediting agency. This Amendment does not generally apply to private associations but does apply where (a) an otherwise private organization is performing a function which is essentially public (the "quasi-governmental function" theory) or (b) a private organization pursuing purely private activities derives a major source of power and control from the state (the "governmental contacts" theory). "The Legal Status" developed arguments in depth for applying both theories to the educational accrediting agency.

If procedural safeguards at the lower two levels do not secure rights to proper notice and fair hearing for an expelled or excluded school, the Fourteenth Amendment due process clause may be able to fill the void.

Governmental regulation of accrediting agencies has not as yet been implemented on a large scale, even though the quasi-public character of these agencies has been examined, as have their many contacts with both federal and state governments.

There appear to be three primary methods by which a state can control, to varying extents, accreditation activities: (1) indirect regulation through competition (the establishment of state [public] accrediting agencies), (2) direct regulation through legislation, and (3) regulation through use of statutes applicable to corporations and associations in general. An example of the latter occurred when North Carolina requested the Southern Association to qualify pursuant to a "conducting affairs" statute.

The federal government does not and never has assumed a major role in the accrediting process. Its restraint stems from a long tradition of state and local control of education.

At present, no federal agency has authority to regulate directly the activities of educational accrediting agencies; nevertheless, some indirect regulatory power has been obtained through provisions in federal aid-to-education statutes. Through their provisions, the Commissioner of Education has two major methods of indirectly regulating accrediting agencies: (a) by a process of official recognition, and (b) by the use of limited power to accredit colleges for purposes of federal aid eligibility. The official recognition is through the Veterans Readjustment Act of 1952 which authorized the Commissioner to "publish a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution" (p. 126).

The accrediting power of the Commissioner, though limited, has increased in importance with the growth of federal aid to education. Its activity takes one of two basic forms. Under some statutes, the Commissioner can set his own standards if there is no recognized agency to accredit colleges in a particular category. The second form of accrediting power operates when an applicant for federal aid is unaccredited, but there is a recognized agency in the field. Under these provisions, if the Commissioner determines that there is "satisfactory assurance" that an institution will meet the agency's accrediting standards "within a reasonable time," it will be deemed accredited for purposes of federal grants. The power is significant since it may be used to bestow a kind of official governmental status upon an unaccredited institution.

"The Legal Status" concluded with recommendations that the autonomy, which is of paramount importance because of the special competence of accrediting agencies, be preserved at the same time the monopoly power of the agencies and the public function they fulfill be supervised with restraint by the courts. It further suggested that to the extent that some control over the general policies and functions of an accrediting agency is needed, state regulation by legislatures and departments of education poses a better alternative than does judicial supervision.

In the history of American accreditation, there have been only three cases litigated involving the voluntary accrediting agencies, each brought against a regional agency.

The first, in 1938, was the *State of North Dakota v. North Central Association of Colleges* (see Appendix B). It involved the expulsion of the State Agricultural College because of alleged irregularities in faculty dismissals. The state charged the Association was interfering with the state direction of its public school system and that it was doing so unreasonably and without a fair hearing. The case was decided in favor of the Association. The judge found that the plaintiff had not exhausted all appeal procedures of the Association and that voluntary associations have the right to make their own regulations as to admission or expulsion of members and one who becomes a member, by that membership, assents to the constitution and rules of procedure adopted by such an association.

The next case occurred in 1967 and also involved withdrawal of accreditation. It was brought by Parsons College against the North Central Association (see Appendix B). The story of Parsons College and its unconventional president, Millard Roberts, has been much publicized. His innovations such as the trimester, core curriculum, and team teaching have become household words in higher education (Gibson, 1968); however, his penchant for publicity and for referring to running his institution at a "profit" in conjunction with his many other unusual policies and procedures finally brought disaccreditation by the North Central Association and with it his unceremonious dismissal. The Board of Trustees of Parsons then decided to sue the NCA and filed a complaint seeking a preliminary injunction that would require NCA to retain Parsons on its accredited list until a full trial could be held on the merits of the case (Koerner, 1970).

The College charged that NCA's attempted disaccreditation was "biased, unjust, arbitrary, oppressive, lacking in good faith, and contrary to natural justice" (Koerner, 1970a, p. 188). It charged NCA with a violation of "rudimentary due process" and said the NCA bylaws did not adequately define standards and procedures so as to afford elementary protection to its members. The College further claimed that it had not been given adequate notice at any time that its accreditation was in jeopardy, had never been presented with a statement of charges to which it could respond, and had had no opportunity to confront its accusers. Finally, it claimed that the standards by which it was judged were nebulous and vague, that enormous financial harm had already been done to the College, and that more would be done if the disaccreditation were allowed to stand.

Judge Julius Hoffman decided against the College in ruling that "rudimentary due process" had been observed, that NCA had not committed either a "legal or equitable wrong," that no violation of bylaws had been proved or any arbitrary disregard by NCA of its own established procedures, and that NCA had not failed to give the College an adequate hearing. However, the court declined to evaluate NCA's standards themselves or its internal procedures or the adequacy of its reasons for disaccrediting the College. In short, the court said that a voluntary association should be allowed to make its own rules and carry on its own business without interference from the courts as long as ordinary due process is observed.

Kaplin (1969) stated that the Parsons College case is a landmark in the developing law of educational accrediting. The opinion considered almost every legal requirement that might conceivably be imposed upon an accrediting agency; hence, it can serve to alert both college administrators and accrediting officials to aspects of the accrediting process with which the courts may become concerned.

The third case, that of *Marjorie Webster Junior College, Inc. v. Middle States Accrediting Association* (1969) involved other issues. (See Appendix B.) This was a case of exclusion, as Middle States had continually refused to evaluate Marjorie Webster, a private, proprietary junior college for girls. It was on the basis of the proprietary nature of the institution that Middle States refused, since it restricts membership to nonprofit institutions.

The case was based on two main arguments: (1) in an unprecedented application of the antitrust laws to education, Marjorie Webster charged that Middle States and the other regionals making up FRACHE were combinations in restraint of trade within the meaning of the Sherman Act; (2) Marjorie Webster charged that Middle States and the other regionals were performing functions inherently governmental, that they were performing them at the request of such arms of government as the United States Office of Education, and that they were therefore subject to the restraints of the Constitution, including the observance of due process and the avoidance of arbitrary and discriminatory acts (Koerner, 1970b).

The College sought no damages and did not seek accreditation, but merely sought to be visited and evaluated by Middle States on equal terms with nonprofit institutions. This case continued over some three months, and the transcript ran more than 7,000 pages.

The important question was whether Middle States was restraining Marjorie Webster's trade to an unreasonable degree by denying its membership. At the heart of this issue were the questions of whether higher education was a "trade" and whether the profit motive was acceptable in the operation of colleges. The question of the effects of the profit motive on education took up more courtroom time than any other; however, little factual testimony about it could be adduced by either side.

The court sustained the College on every major issue of the case. The judge concluded that both Middle States and FRACHE were "combinations" within the meaning of the Sherman Acts, and that the question of whether they had combined for commendable rather than evil purposes was not germane to the issue. He also said that educational excellence is determined not by the method of financing but by the quality of the program. He disposed of the constitutional count quickly, apparently persuaded that the regionals had become quasi-governmental agencies.

Middle States appealed the decision to the United States Court of Appeals for the District of Columbia, where it was reversed. The appellate court said, "The proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of liberal arts and the learned professions" (Brubacher, 1971, p. 112). The Supreme Court has refused to grant certiorari to the Circuit Court's decision.

A Case Comment in the *Harvard Law Review* entitled, "Antitrust Laws—College Accrediting Association's Refusal to Evaluate Proprietary College Not a Sherman Act Violation," hereafter referred to as "Antitrust Laws," takes issue with the reversed decision. It says that the court, rather than relying on conclusory language, should have examined more closely the activity in question to see if the theory of antitrust called for judicial scrutiny. It contends that such an analysis would have led the court to a different conclusion. First, the consequences of Middle States' discrimination were of the sort meant to be prohibited by the antitrust laws. Second, applying the antitrust laws to an accrediting society does not present a danger that all concerted activities—such as consumer boycotts—will be drawn within the scope of the Sherman Act. And third, restricting Middle States in this regard will not prevent educational accrediting societies from achieving any purpose which has arguable educational merit.

"Antitrust Laws" concluded as follows:

> Thus, a decision requiring Middle States to evaluate Marjorie Webster would have encouraged the development of standards that measured a college's performance, rather than those which simply preserve the status quo in educational institutions. The development and enforcement of these standards could open the way for a flow of new money and ideas into higher education, while at the same time preserving a desired quality control (p. 19-20).

The results of these cases seem to indicate that in the future, colleges and universities will have to settle their differences in some arena other than the courtroom. The courts are traditionally hesitant to interfere in educational matters and additionally reluctant to attempt to intrude into the realms of professional expertise afforded by the accrediting associations.

In addition to the questions raised by the legal satus of voluntary accrediting agencies and their increased involvement with the federal government, other problems relating to their relationship with higher education must be addressed.

As has previously been mentioned, throughout the history of the voluntary agencies, criticism has always been voiced. In the 1930's, the spokesman against them was Capen. Presently, the most outspoken critic is Kroerner (1971). He has attacked them on many counts and has said that they often use their power less in the interests of the public than in the interests of the industry they are supposed to regulate. Koerner contended that their greatest failure is to provide the student and his parents with comprehensive and comparative guidance to educational institutions. He stated that the regional accrediting agencies, like any commercial trade group, being the captive of its membership, would not dare suggest that some of its members or their merchandise are better than, or even different from, its other members and their merchandise.

Four other points by Koerner (1971) bring fire against the regionals: (1) the so-called standards and criteria which the regionals impose on institutions as a primary condition of membership rest on no basis of research or theory, (2) they are not voluntary associations but "coercive monopolies," (3) they operate behind a veil of secrecy, and (4) they are used for illegitimate political purposes such as institutions strong-arming legislatures with the threat of disaccreditation.

Less emotionally than Koerner, Pfnister (1971) cogently stated four areas of concern which accrediting agencies must face. These may be summarized as follows:

1. Regional accrediting agencies must determine whether they can remain general accrediting agencies or, if they have already taken on other responsibilities, whether they can now return to assessing only the overall quality of an institution.
2. They must examine whether the increased pressure for public accountability may have an impact on the nature of the criteria developed and the manner in which they are applied.
3. They must determine whether as a matter of fact they are effective in assisting more directly in the improvement of institutions' educational programs.
4. They need redefinition of purpose of the regional accrediting agency involving the assessment of the geographical orientation, and other aspects. They will need to become more general.

It would appear that the concept of voluntary accreditation may be in danger of becoming an anachronism. In an era of increased public intolerance for the "status quo" in many areas and the concern for accountability in higher education, the accrediting agencies may be forced to change. The ultimate result of the changes that occur may be embodied in the identification of the change agent. Will it be the institutions, the federal government, the public, or the accrediting agencies themselves? If the accrediting agencies do not fulfill the role, they may fall victim to others willing to fill the void, which for them would be full cycle. It was at this point that they entered the picture.

Development of State Control of Accreditation

A unique feature of American higher education has been a lack of federal control, quite in contrast to the European educational systems characterized by ministries of education which exert direct control of universities and educational systems. In the United States, jurisdiction over education has been relegated to the states, thereby authorizing them to charter and regulate both public and private institutions of higher education.

The laissez faire manner in which states have exercised their potential authority in such matters has resulted in a wide variation in character and quality of programs among institutions of higher learning. Accreditation was a phenomenon resulting from an effort to bring about some order among such institutions.

Accreditation as conferred by an agency of the state or a voluntary organization applies only to institutions or programs therein, while certification and licensure are forms of approval granted only to individuals upon their fulfillment of certain specified qualifications or standards.

The Board of Regents of the University of the State of New York began accrediting functions in 1784, but most states did not enter the realm of school and program accreditation until after 1910. Even then, the states usually limited their efforts to approval of programs designed to prepare teachers for certification. Some accrediting responsibilities of the states have been shared between the state department of education and state universities or special state commissions.

It is virtually impossible to discuss state accreditation without mentioning certification, because the two are different in nature, but interrelated in practice. Usually, the states would seem to accredit teacher education programs with intent to regulate the quality of those to be certified for teaching upon completion of the programs.

In all the states except Alaska and Hawaii, the state department of education is either directly or indirectly responsible for certifying public school teachers, and such authority is explicitly accompanied by authority to accredit teacher education programs.

In a study by Wilkins (1959), 12 states out of 50 reported that no division of state government was engaged in the accreditation of higher education, but according to the report, only Hawaii, New Mexico, and North Dakota actually had no agency which was responsible for some form of institutional approval.

In 21 states, the agency held responsible for accreditation was the state board of education, but in 12 states this was held to be a function of the department of education. In five states, the chief state school officer performs this function, while in Idaho and Montana the state boards of education accept accreditation of regional and professional associations. Thus, the wide variety of ways of discharging the state responsibilities for accreditation is exemplified.

As was previously mentioned, the responsibility for state accreditation of higher education was first evidenced in the establishment of the Board of Regents by the state legislature of New York in 1784. Through the state department of education, the University was legislated the authority to register domestic and foreign curricula of higher education, a system of state approval which resembles the processes of current regional accrediting associations. Other states moved into the area of accreditation more slowly. Iowa was next in 1846, some 62 years later, followed by Utah in 1896, Washington in 1909, Virginia in 1912, and Maryland in 1914 (Mayor, 1965).

The terminology employed in accreditation varies among the states. Some regard the terms "accredit" and "approve" as synonymous; others do not. Many states reserve the term "accredit" for the voluntary accrediting agencies and use the term "approve" to describe the state functions. Some apply one term to programs of studies and the other to institutions of higher learning. Other terms also in use include "register," "certify,' and "classify" (Mayor, 1965).

Several steps are involved in state accreditation procedures. More than 30 states report a step consisting of establishment of evaluative criteria for institutions or programs. Most send teams to inspect the institutions and consequently publish a list of accredited or approved institutions. The majority of states also conduct a periodic review of accredited institutions and programs (Mayor, 1965).

In the case of *Shelton College v. State Board of Education* (1970) (see Appendix B), the College challenged the constitutional right of the state to regulate the basis and conditions for the granting of B.A. degrees. The court found no reason to curtail the power of the state board to give conditional approval to state institutions of higher education for the granting of such degrees.

Just as procedures for state accreditation vary, so do requirements for placing an institution or program on the accredited list and so the significance of being on a list varies. Many listings are tentative, while some are stable.

Mayor (1965) has classified the meanings of a list into three categories:

1. All colleges and universities on the list are approved institutions of higher learning, implying blanket approval in all program areas.
2. All institutions on the list are approved for teacher education, implying institutional instead of specific program approval.
3. Institutions on the list are approved for specific programs, implying separate approval must be granted for each program such as elementary school teacher, secondary teacher, and administrator.

Increasing Federal Involvement in Accreditation

Professional organizations have rendered great public service by using accreditation procedures to set and control educational standards. Occasionally, their motives and competence in accreditation have been questioned. Moore (1970) voiced a frequently raised public concern that in addition to using accreditation powers for maintaining the quality of professional education, such organizations may be using accreditation to further their prestigious image, reduce competition, and in some cases, prevent reasonable or superior alternatives from being made available to the clientele.

Such allegations have resulted in increasing challenges to professional autonomy in the exercising of accreditation powers. Many writers now view such autonomy as being opposed to the public interest and question the privileges of control which society has permitted the professional organizations (Dickey and Miller, 1972a). Such reactions would seem to indicate that the professions will be forced to share their accreditation powers with other groups involved in accreditation.

The Newman (1971) report hits hard at those regional and specialized accrediting agencies which pressure new institutions of higher education to follow the pattern of conventional established colleges and determine their eligibility for public support. The report advocated that such agencies be modified to include those representing the public interest and that the government (state and federal) reduce their reliance on such agencies for determining eligibility for federal funds.

In November, 1971, the Newman Task Force issued a statement entitled "Accreditation and Institutional Eligibility." It called for separation of accreditation and eligibility for funding and recommended a new federal authority to cope with restrictive practices of nonprofit groups.

The "Report on Licensure and Related Health Personnel Credentialing" issued by HEW (1971) set forth the philosophy that issues of licensure, certification, and accreditation are not immune to public criticism. It stated that both public and private leadership were responsible for integrating health-manpower credentialing with the public interest.

The report declared that the accrediting agencies' quasi-governmental role is directly related to the public interest because of the public funds related to the status they grant. The proposal was made that the Commissioner of Education undertake a formal review of accreditation prior to the possible establishment of a public corporation, chartered by Congress to coordinate accreditation nationwide. It implied that such a corporation could supersede or compete with present accrediting agencies.

The report on "Accreditation and Certification in Relation to Allied Health Manpower" (Pennell, Profitt, and Hatch, 1971) discussed the roles of professional organizations in accreditation. It further stated that accreditation in higher education represented a poorly coordinated effort which greatly increased the federal government's funding efforts for education. It also exhorted professional associations to demonstrate the rationale for their actions to the consumer and the public.

In a letter to the United States Commissioner of Education dated July 3, 1968, sensitivity to government involvement in accreditation was demonstrated. At that time, the Commissioner was establishing the "Accreditation and Institutional Eligibility Staff' in the Office of Education. The letter, signed by 13 representatives of major higher educational organizations in Washington, recommended deletion of the word "Accreditation" from the title for the staff unit. It was felt that the term implied recognition of accrediting organizations, and that to avoid possible implications that the Office of Education might become involved in actual accrediting activities, the term should be dropped (Dickey and Miller, 1972a).

Implications for the Future

The following are some basic and logical assumptions concerning the future of accreditation in higher education:

1. Those who control accreditation control a major component of governance in higher education.
2. Response to the public needs, including those evidenced by governmental programs and long-term public interests is necessary in higher education, but some stability must be provided, lest education become a means to accomplishing various governmental objectives.
3. To maintain the balance of power between short-term governmental interests and long-term societal goals, accreditation should remain diversified and nongovernmental.
4. Increasing federal control of accreditation is accomplished by considerable possibilities for control of educational practices and standards. The exercise of such control would violate the traditional role of the federal government in education (Dickey and Miller, 1972a).

Perhaps it would demonstrate irresponsibility on the part of the federal government to utilize results of nongovernmental accrediting agencies without evaluating those agencies in light of governmental objectives. If so, the government could be expected to increase control and influence over accreditation.

An alternative to the situation would be to substitute governmental procedures for those of nongovernmental agencies. The situation becomes increasingly more complicated in light of every new federal use of accreditation (Dickey and Miller, 1972a).

In addition to the above assumptions, there are several questions which must be dealt with in considering the future of accreditation:

1. Will continuation of the present trends in accreditation result in excessive federal control?
2. If federal control becomes excessive, should present accrediting agencies continue to make their results available for governmental purposes and objectives under guiding parameters for the relationships?
3. Should voluntary accrediting agencies renounce all obligations to serve governmental purposes and refuse to submit to governmental guidelines and review?
4. Could the agencies shift the burden of proof of determining acceptability of accrediting processes by adhering to a policy of affirmative disclosure of policies, procedures, and decisions (Dickey and Miller, 1972a)?

The future improvement of accreditation will be hindered by the following:

1. The attitude of professors that the establishment of regulations for colleges and universities violates academic freedom is a drawback.
2. Apathy exists on the part of major college officials with regard to accreditation as a function of governance in higher education (many consider it a nuisance necessary for its benefits and protection).

3. Opinions differ widely regarding the factors which should be considered in assessing the quality of an institution or program; therefore, accrediting agencies have had to rely on subjective judgments and quantitative factors which have questionable correlation with educational excellence.
4. Educators tend to be more concerned with their particular fields of instruction or colleges than with the governance of higher education as a whole (Dickey and Miller, 1972a).

Finally, the efforts which must be made toward the improvement of accreditation are as follows:

1. University officials and other educators must recognize that society has granted higher education the privilege of self-governance. Accreditation has been the primary vehicle of such self-governance; thus, officials and educators have a societal responsibility to aid in improvement of accreditation and its fulfillment of public needs.
2. The purposes of accreditation must be redefined in light of present and future societal needs, and accrediting agencies should be ready to demonstrate to the public that they are truly meeting those needs.
3. Accrediting agencies must seek ways to improve their techniques of measurement and redefine the factors which reflect the quality of educational institutions and programs (Dickey and Miller, 1972a).

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STATE CONTROL OF HIGHER EDUCATION

by

Anna Johnson and Jane Kalb

Historical Bases

In 1862 the Congress of the United States passed an act to donate public lands to the several states and territories which would provide colleges for the benefit of agriculture and the mechanic arts. The legislation, known as the Morrill Act because of its sponsorship and promotion by Representative Justin Smith Morrill, caused the founding or further development of 70 leading American colleges.

An historical fact not always appreciated is that during the colonial period and the first century or so of independence most New England and Middle Atlantic States gave substantial subsidies to their so-called private institutions of higher education. Harvard, for example, had received over a half-million dollars and 46,000 acres of land by 1874 (Berdahl, 1971).

Each state accepting the benefits of the Morrill Act was obligated to establish at least one college where the leading object would be to teach the branches of learning related to agriculture and the mechanic arts, not excluding other scientific and classical studies, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life (Eddy, 1956, 1957).

The fact that Congressional action was the stimulus for the establishment of many of the land-grant colleges and universities is an indication of their potential value to the national welfare. If they had been intended as institutions of the state alone, Congress would not have acted in their behalf. Their purpose and nature were of national concern and significance. National land was used as a kind of educational trust to supply their beginning endowment. The economy and the quality of agriculture and the mechanic arts were and are of national concern. No state could ever exist of and by itself, producing and consuming its own food and materials for living. Military tactics were provided to benefit and defend the nation as a whole. Each of the features of the land-grant college bill was designed to benefit the United States, not just the single state (Eddy, 1957).

The Constitution might have charged the federal government with the responsibility for the maintenance of a public school system had its writers seen fit to do so, but they did not, and that document does not contain the words "school" or "education." As a result of the Tenth Amendment, the courts have repeatedly held that the matter of maintaining a system of public schools is reserved to the states. They have held that the state does not look to the federal constitution for its authority; it looks there only for restraint upon its power. Because the Constitution is silent on the matter and because it does not deny to the states the right to maintain systems of public education, the matter rests wih the individual states (Garber, 1954).

So, in spite of this national origin and character, the majority of the land-grant colleges became essentially state institutions. They have continued to be integral agencies of the state government. Thus the intent of the Morrill Act was in keeping with the American tradition for local control of education, which had begun in the isolated communities of the raw frontier and had been reinforced by the Constitution. The state was expected to adapt the nationally sponsored college to local conditions. Professor Brewer (in Sawyer, 1948) attributed the following statement to Senator Morrill:

> The general wants and local conditions were very different in the different towns and for the best use of this fund there must be much variety allowed in the details, although all the colleges should be the same in spirit and essentially in grade, that is, colleges in which science and now classics should be the leading idea (p. 31).

A state commonly expresses its educational policy through legislation enacted by its state legislature. A state legislature, unlike Congress, does not exercise delegated and enumerated powers; the very act of creating it confers upon it all powers of a legislative nature that are not expressly withheld. A state legislature has plenary legislative power except where restricted by either the federal or state constitution (Garber and Edwards, 1970).

Relatively simple obligations were put upon the land-grant colleges by the states, and these, again, were in outline only. The college was required to teach agriculture, mechanic arts, and military tactics among its offerings. It could not exclude other scientific and classical studies. The South Dakota Supreme Court in 1933 rendered the opinion that the college had authority to teach any subject not specifically forbidden by state law, but the state had a moral and legal obligation through the Morrill Act to teach agriculture, mechanic arts, and military tactics (Eddy, 1957).

The state must protect the funds derived from the grants of land so that the capital remains undiminished. This, according to the Klein study (1930), "carried the far-reaching implication of future financial support by the State governments themselves" (p. 8).

Since no funds were to be used for construction or maintenance of buildings, the states accepted the implied obligation to make such provisions. Another simple responsibility was the rendering of an annual report of operations and progress and an accounting of the federal funds received. Finally, in order to be eligible, the state had to enact enabling legislation pledging itself to these ends. This was the outline; nothing more was intended or required. There was not even a provision for setting standards, and the states were free to move within this bare framework. The action of Congress and the requirements of specific acceptance by the states has been a healthy influence in controlling the number and character of colleges of agriculture and mechanic arts within each state. These subjects were concentrated by governmental directive and not left to develop and spread by inadequate attempts to meet the need (Eddy, 1957).

In spite of its apparent looseness, the Morrill Act did go beyond previous grant legislation with its specific establishment of the type of college, something of the curriculum, and details for the management of funds; the next step would have been to set the standards. However, Earle D. Ross of Iowa State College credits the traditions of state rights and the practices of frontier individualism with causing a lack of sufficient sentiment for centralization to make this step possible. The wonder is that so little was settled, for Congress could have bowed to the pressures of special interests (Eddy, 1957).

An article in the *North American Review* in 1867, entitled "Our National Schools of Science," commented on the advantage of freedom from restraints:

> Many persons, aiming to benefit the industrial classes, would have insisted on some particular form of institution to be adopted in every state, and would have hampered the bill with objectionable features. . . . Even if there were no danger that . . . extravagances . . . would find place in legislation, it would have been surprising if a spite had been shown against Latin and Greek, or a predilection for manual labor, or a determination that a farm should in all cases be secured. Some advisers would have thought it essential that the general government, in providing the endowment, should perpetually exercise the right of inspection or direction. Military men might have been tempted to insist on a military organization for the discipline of students. But all such objectionable restrictions are happily omitted from the Act of Congress (p. 506).

No provision was made for a racial division of students. With the subsequent offer to and acceptance by returning Southern states, the funds went to white institutions except for four Southern states which set aside part of the endowment for Negro land-grant colleges. The rest were to ignore the Negro until forced to change in 1900 (Eddy, 1957).

Partly due to the expanding nation and partly to the stimulus of another Morrill Act in 1890, the number of land-grant colleges increased substantially during the two decades 1880-1899. Twenty-four more were added to the list in somewhat the same pattern as in the previous 30 years. Between 1900 and 1914 three new land-grant colleges were founded. During this decade and a half, the Universities of Puerto Rico and Hawaii and the Tennessee Agricultural and Industrial State College for Negroes emerged. The list was increased in 1922 with the addition of the University of Alaska. The next period in the life of the land-grant colleges demonstrated even more clearly how much a part of the pattern of American life the colleges had become. In the 22 years stretching from 1915 to 1937, American industry continued to expand, population increased, and the nation became a unit as never before. This period witnessed also a substantial increase in state support of land-grant colleges. In the four years from 1920 to 1924, the average increase in state support reported by 32 institutions was 55.4 percent. In the next four years another increase of 40.6 percent was reported by 40 institutions. The ratio of federal to state funds changed substantially too. At the end of the first decade of the twentieth century, land-grant institutions were receiving approximately one-third of their total income from federal sources. By 1932 only 10 percent came from the federal government (Eddy, 1957).

Within the states, the colleges found themselves increasingly in competition with other state agencies for the state tax dollar. During the depression years of the early thirties, the colleges suffered particularly; practically every college received a substantial cut in state revenue. Salaries and equipment funds suffered the most. Within a few years the colleges found themselves with their highest enrollment on record but without a complete restoration of funds. By 1935 some had been fortunate enough to secure full or partial restoration of salary cuts and general reductions, but losses of as much as 30 percent were still reported. It was not until the end of the thirties that most colleges found themselves in adequate financial condition to operate satisfactorily, although enrollments continued to bring problems, which in many states have not been solved to this day (Eddy, 1957).

With an increase in state funds came an increasing interest in state control. The colleges had argued from the beginning that they were not a part of the state government as such. For instance, Davenport, in Eddy (1957), claimed that the college "is an extra-governmental and highly technical enterprise needing its own special machinery and dependent upon the legislative rather than the administrative branch for direction and support" (pp. 153-154). Despite this view, the colleges recognized as early as 1922 the seriousness of the problem. In that year the feasibility of a thorough study of administrative relationships with respect to centralized financial control was discussed. Again in 1925 it was reported that some states were seriously hampered by policies determined for them at the state capitol. In 1930 the United States Office of Education published an extensive two-volume study of the land-grant colleges. Its conclusions summarized the increasing difficulty:

> Recent re-organizations of State governments, the creation of State budgets, and the extension of the power of State agencies over the finances and the internal affairs of the land-grant colleges have in many instances tended to supersede the authority of institutional governing boards and institutional administrative officers (Klein, 1930, p. 73).

The shortage of state funds in the depression of the thirties made the situation even more serious; for uniform state policies restricted the institutions. The economy-minded state officers did not trust entirely the legal unbusinesslike notions of educators. In many states no effective solution would be reached, but the problem would rise again and plague the colleges even to the present day (Eddy, 1957).

By the end of the thirties and prior to World War II, America had become as highly industrialized as any nation in the world's history. The colleges which had been found lacking after the First World War were ready for the more immense problems which would follow the Second.

They were no longer merely keeping abreast of national developments; they were now exerting their leadership. Before examining what took place within the colleges during this period, it is appropriate to review their sources of support. By 1951 the contribution of the federal government to the maintenance and support of the colleges amounted to approximately $50 million annually. This was divided three ways: $5 million for campus instruction, $12.5 million for experiment stations, and $32 million for cooperative extension. In terms of funds for resident instruction, each state (and the two territories of Alaska and Hawaii) received automatically $70,000 in each year, the total sum comprising approximately $3.5 million of the $5 million. The remaining $1.5 million was distributed on the basis of population. Direct federal support for resident instruction for all of the colleges amounted to approximately 2.3 percent of the total expenditures for such instruction. In addition, the colleges received annually $1,774,666 as endowment income from the original Morrill land grant, or 0.8 percent of expenditures for resident teaching (*Commission*, 1955).

The principle of federal support is an important one to the institutions, although the ratio of federal to state funds continues to change. For many years the federal government had practically matched the state support. In recent times the increase has been met largely by higher student fees, an increasingly important source of income. In a number of states direct tuition charges are levied (Eddy, 1957).

With increases in state support have come tendencies toward greater state control. The power of the governor and of the executive branch of the state government has been extended by law in a number of states. State control has been active in such areas as purchasing, academic and nonacademic personnel appointments, publications, and accounting. In a survey conducted in 1953, and reported in Eddy (1957), President A. L. Strand of Oregon found that of the 47 institutions replying, 22 indicated that they "have lost some degree of control of their internal affairs to some outside governmental agency, and seventeen feel that there is a definite trend toward exactment of more controls. Only two report controls receding" (p. 209). As the state higher education picture has become more complex, a number of states have created over-all boards or commissions to centralize control with the avowed purpose of preventing needless duplication of program and facilities. Texas, Oregon, Georgia, New York, and North Carolina are examples of states in which the land-grant institution is now a part, in one fashion or another, of a statewide system of publicly supported higher education (Eddy, 1957).

Waldoch (1972) gave three examples of state control: Montana, Arizona, and Utah. Article XI, Section 11, of the Montana Constitution reads as follows:

> The general control and supervision of the state university and the various other state educational institutions shall be vested in a state board of education, whose powers and duties shall be prescribed and regulated by law (p. 76).

In Arizona it was held that the Board of Regents of the University and

State Colleges, created by legislative act pursuant to Article II, Section 2, of the state constitution, is vested by the constitution with a sphere of authority such that its power to appoint and supervise the employees of the institutions under its jurisdiction cannot be infringed upon to the extent of making these employees subject to a state civil service system. Provisions of the Utah Constitution are as follows:

> The location and establishment by existing laws of the University of Utah, and the Agricultural College are hereby confirmed, and all the rights, immunities, franchises, and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively (p. 83).

Brubacher (1971) highlighted significant decisions of the court with regard to higher education pointing out that since the middle of this century the impact has been shifting, although historically universities have enjoyed a large degree of autonomy. The preference for university autonomy is clear in *Hartigan v. Board of Regents of the University of Virginia.* In this case the court went beyond the immediate question to indicate an emphatic distaste for arrogating to itself the prerogatives of the university governing board.

Levi (1969) argued against external interference to solve campus troubles. He took the position that "the institution, in the preservation of its tradition and function, must be master in its own house" (p. 405).

Higher education in the South, as elsewhere in the nation, is in a period of transition (McFarlane and Wheeler, 1971).

The document resumé compiled by Wattenbarger and Martorna (1970) included the following listing for Kentucky:

> KENTUCKY. The 1966 Session of the General Assembly legislated substantive changes in the membership, duties, and responsibilities of the Council on Public Higher Education. Present responsibilities include research to determine the needs of overall higher education in Kentucky, comprehensive planning for public higher education, setting entrance or registration fees, review of budget requests of the public institutions of higher learning, approval of new professional schools, recommendations to the governor for proposed new community and four-year colleges, prescription of curricula for teacher education, and serving as the agent of the state in general and statewide higher education matters. The council is composed of nine lay members, appointed by the governor for terms of four years, and chief executives of the four-year state-supported institutions of higher learning. Nine laymen constitute the voting membership of the council.
>
> The 1966 General Assembly authorized each of the four-year state-supported institutions of higher learning to provide community college programs in their respective communities. The original community college legislation of 1962 established the statewide community college program as a part of the University of Kentucky. The curricula of the community colleges include transfer programs, and adult and general education offerings.
>
> A higher Education Assistance Authority was established in 1966 to administer scholarships and financial aid (p. 13).

This summary of Kentucky's legislation during these years indicates the emergence of certain patterns in establishing higher education programs. Some of the recent trends are that the community junior college, in terms of legislation, is recognized as a separate entity in the field of higher education; that legislative approval of the establishment of new institutions is becoming standard procedure; that many states have state-level coordinating agencies for their institutions of higher education; that support of scholarship funds is becoming a point of concern in many states; and that Kentucky, along with several other states, has legislated separate vocational-technical schools.

Present Concepts

Although each state's relationship with its postsecondary institutions is different to some extent, the central goal has remained: to meet the needs of its citizens for training beyond high school.

As usually defined, higher education encompasses only public and private two-year and four-year colleges and universities. Defined in this way, higher education includes some 2,500 institutions and about eight million students. Postsecondary education, more broadly defined, includes private profit and nonprofit trade and technical schools, public adult and area vocational schools, and various trade-union apprenticeship programs as essential parts of the state education planning. Under this definition, postsecondary education includes about 10,000 institutions and 10 million total enrollment (Carnegie Commission, 1971).

As power over education is not specifically granted by the Constitution, the federal government has a limited role in planning, developing, and funding education. As the Constitution does not clearly define education control, it is assumed that this power is reserved to the states. Most federal government control is of an indirect nature, such as the satisfaction of special national needs by the granting of funds for scientific research or increasing equal opportunity.

In its 1971 study, the Carnegie Commission stated that the state governments are the best situated to exercise the major responsibility for postsecondary education. Even if our federal structure permitted a national system, such a system would probably be undesirable because of its inability to respond sufficiently to the different patterns of postsecondary education already existing in the various states or to the states' varying cultural and economic needs.

The state governor and the state legislature have the most control over institutions of higher education in each state. The powers of the governor include the following:

a. Power to approve or disapprove budget allocations from state funds to colleges and universities
b. Power to appoint, sometimes without review or consent of any other body, the members of governing boards of public universities and colleges, and the members of state coordinating and/or planning agencies

c. Position as active chairman or voting ex-officio member of the governing boards of public institutions in many states
d. Power to sign into law or veto legislation which directly or indirectly affects higher education
e. In some states, the authority to review and approve or disapprove master plans for university or college growth in the state
f. Power to affect decisively public attitudes toward higher education (Carnegie Commission, 1971).

The powers of the state legislature are as follows:

a. Budget appropriation
b. Coordination of higher education system (while the planning may be carried on in another agency, in many states the ultimate authority for plan approval rests with the legislature, and in all states significant elements of the plans cannot be implemented without legislative appropriations)
c. Providing the structure for coordination in the state
d. Providing impetus for planning of the state system (Carnegie Commission, 1971).

In Kentucky the latter roles are assumed by the Public Council on Higher Education.

When recently questioned in a study by Eulau and Quinley (1970) for the Carnegie Commission about the amount of control the legislature has over higher education, most legislators maintained that they should restrict their decision making to appropriations and perhaps very general policy guidelines, such as stipulating that admission policies should not discriminate among racial groups. The *details* of admissions policies, curriculum and even construction of facilities were essentially "academic matters" best handled by officials such as boards of regents and independent coordinating boards, who are better qualified and less subject to political pressure than the legislators. Legislators felt they lack the information on which to base these decisions. Some also felt that the executive role should be a liaison and intermediary between educators and the legislature. The most frequently cited instances which led legislators to seek detailed control over academic affairs, or at least over specific situations, were student demonstrations and what was termed "radical activities" on state campuses.

At the beginning of the twentieth century, most of America's 1,000 public and private colleges and universities operated as separate entities, a pattern which had persisted for more than two centuries. But operation as separate institutions, particularly for publicly supported colleges and universities, became both less feasible and less desirable in the twentieth century. Developing pressure demanded the creation of new relationships among the units and revision of patterns for interaction with the state government.

The form of coordination that resulted in response to increased public pressure for educational opportunity and desired access to higher education was that of consolidating several units under a single governing board or establishing coordinating agencies. Coordinating agencies imply the existence of separate units, each with some freedom of control in its own operations, and thus the need for a technique or mechanism by which they can act together toward some purpose. The coordinating agency must be persuasive, and the units must be willing to subordinate their individual interests to common goals.

The first coordinating board was established in Oklahoma in 1941. The first such board was not enacted in the state of Kentucky until 1950.

Two types of coordination exist today:

1. Voluntary coordination—Established by the institutions themselves, this form has proven to be rather ineffective. This may be due to insufficient acceptance of common goals or too great an adherence to the aims of individual institutions. Today voluntary coordination is used in only the state of Nebraska.
2. Compulsory coordination—Compulsory coordinating boards now exist in 27 states. These agencies have specifically defined responsibilities, some with advisory functions only. Typically the coordinating agency does not control administrative detail such as hiring and firing of institutional personnel or control of the budget at the operational levels. The particular mixture of advisory and regulatory responsibilities varies from state to state. The boards in 13 states might be characterized as primarily advisory, while the remaining 14 are mostly regulatory in nature.

The major purposes of coordinating agencies are to avoid wasteful duplication in programs and to encourage sufficient diversity within the system to satisfy the diverse educational needs of the state.

In addition to coordinating agencies, states have increasingly favored various types of overall educational planning. Planning grew out of broader and more long-range concerns. Statewide planning must first be concerned with setting of goals—the economic and social goals of state, the goals of the educational system and its institutions, the goals of the individuals within the system—and the interaction among these sets of goals. Then plans must be made for the optimum allocation of resources to accomplish the desired ends. However, in a recent article by Fields, "U.S. Involvement in State Planning Alarms Colleges," in the December, 1972, *Chronicle of Higher Education*, concern was shown by academic and state administrators about the law, effective July 1, 1973, which requires state planning commissions if states are to receive federal funds. The new law requires that the state planning agencies be "broadly and equitably representative of general public, public and private, nonprofit and proprietary institutions of postsecondary education in the state," including "adequate representation of both sexes, and all racial, ethnic, and economic groups in the state." In addition, these agencies must have a significant number of "public members who are not official employees, board members, or trustees of any postsecondary educational institution, association, etc." (students are included in this group) and at least one member "who has an official connection or relationship with each type of postsecondary education institution" named in the law (p. 2).

There are 1400 private universities and colleges in the nation enrolling about one-fourth of all college and university students in response to the constant need for a strong private college sector in American higher education. The presence of the private colleges extends diversity, provides a valuable dimension for developing quality, aids in protecting autonomy for all higher education, and fosters the type of institution which gives individual treatment to individual students.

The traditional distinctions between public and private institutions seem to be diminishing. Distinctions are now often based more on institutional type or on quality of the institution than on whether the institution is public or private. Endowment funds, which traditionally have been important to the private sector, have grown in significance at certain public universities. The average endowment per student at a private institution is still more than six times the average endowment per student at a public institution, but the importance of endowments in total income has declined for both types of institutions. For the most part, present federal higher education programs do not make material distinctions between public and private institutions except for prohibiting the use of public funds for sectarian purposes.

Public institutions have traditionally relied heavily upon government support as a source of funding. Private institutions, in recent years, have received increased support from federal sources, from 15 percent of the total income in 1957 to 25 percent in 1966. The federal support, much of which is concentrated in the major private universities, has been largely for research support. If federal research grants are excluded from federal support and also from total income, the increase in federal support to private institutions from 1957-1966 was 1 percent to 5 percent.

Examples of public funds, other than research grants, which are available to private institutions are as follows:

a. Various tax preferences or exemptions
b. State scholarship programs
c. Merger
d. Contractual arrangements
e. Direct grants
f. General formula institution grants
g. Special formula institution grants
h. Limited purpose or categorial grants

The Constitution of the United States prohibits Congress from making any law "respecting an establishment of religion," and through the 14th Amendment this restriction is extended to the states. An example of litigation of this type is the case of *Horace Mann v. the Board of Public Works* (1966) in which the Court ruled as follows:

> Hood College, although a church related school, may constitutionally receive state grants. It could not be said to be sectarian as the college's stated purposes in relation to religion are not of a fervent, intense, or passionate nature, but seem to be based largely upon its historical background. Thus, the primary purpose of the grant to Hood College was not to aid or support religion (Carnegie Commission, 1971, p. 42).

Providing state funds to private institutions may pose greater political than legal difficulties. At the present time, no state with a major portion of its students in public higher education has established a program of institutional grants to private institutions. In states where public institutions are carrying the major portion of enrollment in higher education and where there are increasing pressures to slow down the increase in state expenditures in higher education, it seems clear that a program of institutional grants to private institutions from state funds would simply result in a decrease in funds available for public higher education. It is more feasible, from a political standpoint, to support particular private institutions for educational services which are clearly needed by the state and which are not sufficiently available from public institutions.

It is an apparent assumption that public institutions, because of their public financial support, have substantially less control over their own institutional plans and programs than do private institutions. Private institutions have enhanced American higher education because of their relatively greater freedom to experiment, to offer diversity, to control their size, and in general to resist pressure toward homogeniety. The question of the present era is will they be able to continue to make such contributions if significant proportions of their funding comes from public sources. The fear that state funds carry political strings is not unfounded. In the article "Educational Trends and the 70's," Smith (1970) discussed this matter:

> The fear of greater political control is felt more extensively within state institutions, especially with regard to irrational controls sometimes exercised by state legislatures in the face of shifting public opinion. The relative independence of institutions must be safeguarded from unwarranted public interference.
>
> . . . .
>
> While the threats of federal control are not to be discounted, there are signs on the horizon that the federal government and certain state governments are seeking not simply to maintain but to create a more viable diversity of institutional types which can complement rather than duplicate each other (p. 135).

Under no circumstances can institutional independence be considered absolute. All educational institutions, whether they directly receive public support or not, have a certain degree of public responsibility. All are answerable in the general laws, and since all educational institutions receive some special tax privileges, they incur certain public responsibilities. Furthermore, all institutions have a responsibility to their own constituents and to their immediate environment to operate in a reasonably orderly fashion; they also have a responsibility, especially to their students, to provide the type of education for which the students contracted. But the broader types of public accountability involving general fiscal controls, responsibility for manpower development, and responsibility for meeting educational demands of society are usually limited to those institutions which obtain a significant portion of their funds from public sources.

Public and private colleges have a mutual concern and interdependent goals—private colleges want to share in public funds and public colleges want a measure of private autonomy. As Smith (1970) indicated, "In the future the 'totally independent and autonomous college or university' will be a myth" (p. 136). For both financial and educational reasons, no institution will be able to afford the luxury or illusion of total independence.

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APPENDIX A

A SELECTED AND ANNOTATED BIBLIOGRAPHY ON LEGAL PROBLEMS IN HIGHER EDUCATION

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"AAUP Commits to Bargaining for First Time," *The Chronicle of Higher Education*, Vol. VI: no. 9, (November 22, 1971), p. 1.

The AAUP for the first time has made a formal commitment to collective bargaining. They will pursue collective bargaining, as a major additional way of realizing the association's goals in higher education. Heretofore, the AAUP had served as a collective bargaining agent for few institutions. Recently, it has been more aggressive.

Academic Freedom and Civil Liberties of Students in Colleges and Universities, American Civil Liberties Union, New York, New York, (April, 1970), ERIC: ED 047 629, 47 pp.

This pamphlet is a revision of the ACLU's handbook on academic freedom and civil liberties for students in institutions of higher learning. Section IV discusses personal freedom in terms of student residences, personal appearance, and search and seizure. Section VII deals with the confidentiality of student records. Recent court decisions on student rights and constitutional amendments relevant to standards of academic freedom are included in the appendix.

"Acedemic Freedom and Tenure: Gonzaga University," *AAUP Bulletin*, Vol. 51: no. 1, (March, 1965), pp. 8-20.

On March 24, 1960, Professor Richard T. Trench, a member of the faculty of the School of Law of Gonzaga University received notice that his contract would not be renewed when it expired. The notice was received only sixty days prior to the end of the academic year. The issues investigated are: whether the circumstances of the termination violated accepted principles of academic due process; and what implications the case and its surrounding circumstances have as to recognition by the University of accepted principles of academic freedom and tenure

Academic Freedom, The Scholar's Place in Modern Society, Baade, Hans W., Ed., Oceana Publications, Inc. Dobbs Ferry, New York, (1964), pp. 1-172.

This book is essential in that it provides a well written, well documented analysis of academic freedom—its philosophy and history. It makes use of Supreme Court opinions on academic freedom, and gives one an understanding of relevant Constitutional rights. Every phase of academic freedom is covered and expertly discussed with relevant local, state, and federal court cases.

"A Judicial Document on Student Discipline," *Educational Record*, Vol. 50: no. 1, (Winter, 1969), pp. 12-20.

This article represents a statement of judicial standards of procedure and substance applicable, in the absence of exceptional circumstances, to actions concerning discipline of students in tax supported educational institutions of higher education. "Obligations of students" and the "nature of student discipline compared to criminal law" are discussed.

"Constitutional rights of Students," Paper presented to the School Law Conference sponsored by the College of Education, University of Florida, (1969).

A compilation of papers covering trends in college student dissent, regulation of student conduct, keeping the college out of court, and a design for policies governing student activities. The second section contains four articles on due process.

"Are Your Employment Practices Legal"?, *ERIC Junior College Research Review*, Vol. 6: no. 3, (November, 1971).

As the number of eligible candidates increases, so does the questioning about employment and certification requirements. This article views some of the potential problems that junior colleges will be facing in light of employment practices. Valuable court cases and recent judicial decisions are reviewed to facilitate an understanding of the legal ramifications.

Arndt, J. R., "Substantive Due Process In Public Higher Education: 1959-1969," *Journal of College Student Personnel*, Vol. 12: no. 2, (March, 1971), pp. 83-94.

The purpose of this article is to discuss legal parameters pertaining to substantive due process in public institutions of higher education as it is involved in disciplinary cases resulting in dismissal and suspension of students. Current state and federal court decisions are cited.

"Attempts to Fire UCLA Communist Ruled Unconstitutional by Court.", *The Chronicle of Higher Education*, Vol. IV, (February 24, 1970), pp. 2-3.

A judge has ruled that California Regent's twenty-nine year old policy against hiring communists is unconstitutional. He ruled that the firing because of membership in the Communist Party is a violation of the Constitutional rights of freedom of speech, assembly, and association.

Bakken, Clarence J., "Legal Aspects of In Loco Parentis," *The Journal of College Student Personnel*, Vol. 8: no. 4, (July, 1967), pp. 234-236.

Dr. Bakken discusses the doctrine of "In Loco Parentis" with reference to legal cases which have become precedent in determining the nature and actions that institutions of higher education should take regarding this topic. He also covers the areas of housing, student activities, and the area of discipline with regard to In Loco Parentis. The writer's theme is that the departure of "In Loco Parentis" as a legal principle will place a hardship on vast numbers of students, and take away a protection that is now built into the system.

Bakken, Clarence J., *The Legal Basis for College Student Personnel Work*, Student Personnel Series, No. 2, The American Personnel and Guidance Association, Washington, D.C., (1968).

This book emphasizes a variety of topics that would be of interest to any college student personnel worker or administrator. There are over two hundred cases used as examples within text. It shows the basic principles of the law as it now exists and has developed over the years. The areas under consideration include: (1) authority for student personnel services; (2) admission and continuation of records; (3) health, and counseling services, and (4) student discipline.

Bednarels, D. I., "Wisconsin Students Test Legal Basis of University Authority," *The Chronicle of Higher Education*, Vol. 11: no. 8, (1967), p. 6.

This article questions the legal basis of the University of Wisconsin's authority.

Blackwell, T. E., "Court Affirms University's Rights to Discipline Students," *College and University Business*, Vol. 43: no. 3, (1967), pp. 16, 20.

The article deals with a California decision emerging from the Berkeley disturbances in 1964. One student was dismissed and three were suspended as the result of the University president's statement on student discipline. The results have set standards for universities in student discipline.

Blackwell, Thomas E., "Court Examines Who's A Resident," *College and University Business*, Vol. 42, (March, 1967), pp. 86-88.

Blackwell elaborates on the Federal District Court decision that a student formerly registered as a nonresident who marries, establishes home and pays taxes has established sufficient cause for resident classification. The right of a University to charge resident and nonresident fees was also affirmed by this court ruling.

Blackwell, Thomas E., "Higher Education and the Law: Four Significant Issues," *The Chronicle of Higher Education*, Vol. III, (January 27, 1969), p. 8.

The two topics of interest in this article relate to academic freedom. The question of teachers striking against the state is discussed as well as the subject of colleges barring subversives from campus. Recent court decisions are related.

Blackwell, Thomas E., "Is A University Liable for Student Grades?", *College and University Business*, Vol. 37: no. 6, (December, 1964), p. 58.
It suggests that a university is liable in damages for failure to award a passing grade. Mr. Joseph S. Robbin brought suit in a federal district court against the American University for compensatory and exemplary damages.

Blackwell, Thomas E., "Free Speech Cited by Two Faculty Members In Legal Actions Against Their Dismissals," *The Chronicle of Higher Education*, Vol. IV, (March 16, 1970), p. 8.
Two professors that participated in Anti-war campaigns charge their contracts have been terminated because of their exercise of free speech. Both cases are pending in the courts. A report of court action to date is given.

Blackwell, Thomas E., "Federal Decision Offers Guidelines on Procedure for Student Discipline," *College and University Business*, Vol. 40: no. 1, (January 1966), p. 62.
The decision set important guidelines for expulsion procedures of College students. The notice of expulsion should contain a statement of the specific charges and grounds, which, if proven would justify expulsion.

Blackwell, Thomas E., "Court Upholds Right of University to Ban National Fraternities," *College and University Business*, Vol. 40: no. 2, (February, 1966), p. 70.
This article discusses a New York State Supreme Court's ruling that it was unreasonable to require trustees of State University of New York to reconsider standing policy banning nationally affiliated fraternities and sororities from all public colleges and universities in the state with the entry of each new school into the state system.

Blackwell, Thomas E., "Out-Of-State Tuition Differentials Raise Questions: Who's A Resident?", *College and University Business*, Vol. 39: no. 4, (November, 1965), p. 74.
This article involves two court decisions that illustrate difficulties in residence determinations. It discusses the constitutionality of affirmed state statute allowing free discrimination. A "Resident" was determined not synonymous with a "citizen" according to the Ohio Supreme Court.

Blum, Albemt, "Collective Bargaining: Ritual or Reality," *Harvard Business Review*, Vol. 39, (November-December, 1961), pp. 63-69.
This is a business oriented view that considers the true nature of collective bargaining as a process of communication. It is applicable to the field of higher education.

Brown, Ralph S., and Israel Kugler, "Collective Bargaining for the Faculty," *Liberal Education*, Vol. 56, (March, 1970), pp. 75-85.
Brown, a law professsor and Kugler, a union president exchange opposing points of view on the relative merits of a collective bargaining model for higher education.

Brubacher, John S., *The Courts and Higher Education*, Josey-Bass Inc., San Francisco, (1971), 164 pp.
Brubacher's book implies that recent court decisions have affected an important reduction in the traditional autonomy of colleges and universities. The author observes that there is an increasing tendency of courts to examine legal relationships within the university context. The author's major thesis is that court intrusions into academic institutions should be viewed with great skepticism if not outright disapproval. Finally, by way of example, the author discusses cases involving access to public records, and the question of confidentiality.

Brubacher, John S., *The Law and Higher Education: A Casebook*, Fairleigh Dickinson University Press, Vol. 1, (1970).
This volume contains cases that deal first with students and then with faculty, and is divided into chapters or categories covering students' rights to higher education, campus disturbances, dismissal procedures, the status of out-of-state students with regard to voting and paying higher tuition than residents and student societies.

The section on faculty concerns their appointment, dismissal, their academic freedom, and their civil liberties. It contains many facts of interest in regard to policy and future trends of law in higher education.

Brubacher, John S., *The Law and Higher Education: A Casebook, Fairleigh Dickinson* University Press, New Jersey, Vol. II, (1970).

This volume devotes itself to cases dealing with administration, academic programs, and torts. Cases under the administrative category involve the traditional autonomy of the university, distinctions between public and private institutions, the university and private business, problems of insubordination and intricacies of giving gifts to higher education. Then follow the cases concerned with the academic program, management of the curriculum, and problems dealing with accreditation. The final section on torts includes those incidental to instruction, and those arising out of the fair use of the university's name.

Bruin, Hendrik C., "Education and Due Process," *Education*, Vol. 90: no. 2, (November-December, 1969), pp. 174-175.

This article attempts to provide school administrators with a guide that will help minimize disruptions in the educational process and protect them in the event of litigation.

Byse, C., "Judicial Review of Student Dismissals," *School and Society*, Vol. 96: no. 2312, (November 23, 1968), p. 420.

This is a short review by a professor of administrative law at Harvard, who answers critics of judicial review of student dismissals. He supports students who seek redress in the courts.

Caldwell, W. F., "Changing Legal Relationships Between Students and Universities," *College and University*, Vol. 45: no. 3, (Spring, 1970), pp. 245-265.

In this well-written article, Caldwell explicates the fact university officials are alarmed and worried about the current tendency to judicialize the academic process. He discusses the increasing judicial disposition to examine an academic institution's rules in the light of civil due process. The Dixon Case and post-Dixon Cases are discussed at length. He also provides a sound examination of judicial intrusion.

Callis, Robert, "The Relationship Between A College and Its Students," American Personnel and Guidance Association, Washington, D.C., (1969), *ERIC*: ED 101 694.

The author suggests that student personnel workers be less concerned about being parents and more concerned about being educators.

In Loco Parentis is discussed.

Chambers, M. M., "Freedom of the College Student Press," *ERIC*: ED 051 772, (January, 1971), 18 pp.

There is considerable debate on and off campus about the extent to which student editors and reporters can legitimately express controversial views and whether they can use indecent words; and whether university and college administrators can censor or suppress student publications. This paper reviews some of the cases of freedom of the College press and court pronouncements related to these issues.

Chambers, M. M., "Speaker Bans and the Courts," *Educational Forum*, Vol. 35: no. 4, (May, 1971), pp. 471-478.

This article summarizes the major decisions of the Courts in recent years on speaker bans on college campuses. No case directly involving a speaker ban has reached the United States Supreme Court.

College and University Business Administration, Chapter 2, "Legal Problems," American Council on Education, Washington, D.C., (1968), pp. 17-26.

This chapter gives a college or university administrator some of the principles of business law so that he may avoid creating legal problems, be able to recognize some of the more serious problems, and be able to seek and use legal assistance in an effective way.

The chapter concentrates on: arrangements for legal counsel, relationships with faculty and other staff, and problems relating to taxation and regulatory bodies.

Cormier, Clif, "Florida Fires Four Who Refuse to Take Oath," *The Chronicle of Higher Education*, Vol. IV, (December 15, 1969), p. 5.

The University of Florida dismissed four of their employees because they refused to sign a loyalty oath required by the University. The President, Stephen O'Connel, has requested the Board of Regents to obtain a swift answer from the courts or to delay enforcing the requirement.

Cortett, Donald Frederick, "The Development of a Model for Instructor Tenure in the Community College," (1970), *ERIC*: ED 046 385, 167 pp.

This study was undertaken to determine the information that experience has shown is legally necessary for tenure policies, and to establish a model for tenure in the Community College. Legal trends established in recent court cases are discussed in three fundamental classifications. The first is a study of court cases involving involuntary action, dismissal, and abolishment of positions. The second is a study of court cases by cause of litigation. The third is a study of cases according to a consideration of charges, (immorality, incompetence, non-compliance with rules, etc.).

"Court Reverses Tuition Refund For Closing," *The Chronicle of Higher Education*, Vol. 5: no. 27, (April 12, 1971), p. 2.

The Appellate Division of the New York Supreme Court has reversed the decision of a lower court's decision that New York University had to refund tuition to a student's father for nineteen days of classes that were cancelled due to student disorders.

"Court Rules Three Universities Autonomous," *The Chronicle of Higher Education*, Vol. 6: no. 12, (December 13, 1971), p. 4.

A state court has ruled that the legislature can not control the management of Michigan's three major universities. The court said that the institutions have "absolute management and exclusive control" of their expenditures.

Crowl, John A., "Court Ruling on Property Tax Could Affect Community College Financing," *The Chronicle of Higher Education*, Vol. 6: no. 5, (October 26, 1971), p. 1.

In the Serrano vs. Priest Case, the California Supreme Court advised a lower tribunal that in its opinion, the use of the local property tax as the primary means of financing education was unconstitutional. There is question about what effect this decision will have on the future community colleges.

Crowl John A., "Right of Hearing on Non-Renewal is Reaffirmed," *The Chronicle of Higher Education*, Vol. 5: no. 37, (August 2, 1971), pp. 1 & 4.

The U. S. Court of Appeals has decided that a non-tenured faculty member must be granted a hearing if his teaching contract is not renewed. The Supreme Court has agreed to hear a similar case as well as this case affecting the University of Wisconsin. The Supreme Court decision in the cases could end the conflict among district and appeals courts in the growing number of judicial challenges to institutions that have not renewed the contracts of non-tenured teachers.

Day, James F., and William H. Fisher, "The Professor and Collective Negotiations," *School and Society*, Vol. 95, (April, 1967), pp. 226-229.

Day and Fisher examine some of the reasons behind the growing unrest among college personnel and present several of the alternatives open to professors. They present the view of the tenable position of the college administrator in the wave of this unrest.

Dimensions of Academic Freedom, "The Strike and the Professoriat," Kadish, Sanford H., University of Illinois Press, Urbana, (1969), pp. 34-68.

Kadish cites recent strikes that have occurred on major college campuses and their relevance to academic freedom. Collective bargaining is discussed as are various types of strikes initiated by professors and teachers. Throughout its context the AAUP's views and actions are presented with regard to the strike. The beginning of the article has legal tones.

"Discrimination: Women Charge Universities, Colleges With Bias," *Science*, Vol. 168: no. 3931, (May, 1970), p. 559-561.

Forty-three colleges and universities have been charged with discriminatory employment practices against women. As a result, federal contracts presently held by institutions and new contracts may be cancelled. Enforcement, source of pressures, and future sanctions by the federal government are discussed.

Doherty, Robert E., "The Law and Collective Bargaining for Teachers," *Teacher's College Record*, Vol. 68: no. 1, (October, 1966), pp. 1-12.

This is a survey of the legal status of collective bargaining for teachers in higher education and secondary schools in a number of states. Doherty identifies some implications and provides a number of suggestions for a "model" statue. Court Litigation is reviewed.

Education Court Digest, Bund, Emanuel, (Ed.), Volumes 7-13, (1963-1969), (bound under one cover).

This is a monthly summary of reported state and federal court decisions in the field of education, including public, parochial and private school instruction and administration on all levels, higher education, school and teacher accreditation, and judicial decisions on education legislation, prepared for use by educators and educational agencies.

Engel, Ross A., and Gary K. Widmer, "Crisis on the Campus: A Challenge to Administrators," *Educational Forum*, Vol. 35: no. 3, (March, 1971), p. 344-352.

The purpose of this article is to state briefly what the law is regarding the avenues avaiable to college administrators when confronted with violent protest. Policy suggestions and legislative proposals are provided in the content.

Ewbank, H. L., "Who's In Charge?", *AAUP Bulletin*, Vol. 55: no. 4, (December, 1969), pp. 455-458.

This article is concerned with a controversial incident in 1968 over *The Purdue Exponent* newspaper. Legal opinion established that, especially where the name of the institution is a part of the masthead, and where no other agency exists as publisher, the college or university, or faculty does not occupy the legal position of publisher of the campus newspaper.

"Excerpts from the Report of Bar Association Commission," *The Chronicle of Higher Education*, Vol. IV, (February 24, 1970), pp. 2-3.

This is discussion of a report from the American Bar Association on freedom of association, freedom of expression, freedom of press, freedom within the classroom, and disciplinary procedures. This article is directed toward students, but the overall report has implications for the faculty as well.

Goldman, Alvin L., "The University and the Liberty of its Students: A Fiducory Theory," *Kentucky Law Journal*, Vol. 56, (1965-1966), pp. 643-682.

Present case law examples include constitutional "in loco parentis," trust theory and contractual approach; role of judicial restraint-impact of judicial deference to university disciplinary decisions, error of judicial deference; four reasons why courts are reluctant to enter the student discipline area: "strangle hold policy," (colleges are in solid control of the situation, i.e., too difficult for students to easily change colleges), "dismissal swamp policy" (court encounters difficulty in trying to learn terminology, customs, rules, and regulations governing the area of controversy), "hot potato policy" (court preference for avoiding decisions in controversial matters), and fear that judicial intervention may do more harm than good. This article is a good example of some of the present legal problems in the university.

Gordon, Kenneth W., "Due Process: A Swing Toward Student Rights," *Journal of College Student Personnel*, Vol. 12: no. 2, (1971), pp. 95-101.

This article says that very few areas have left their mark on higher education as dramatically as the due process relationship between the colleges and the students. The article gives evidence of the growing number of court cases involving due process law and higher education. Relevant cases are viewed.

Halstead, Francis E., "The Legal Status of the Non-Public College in The United States," Denver University, Colorado, (1966), *ERIC* ID: 010 584.

This is a national survey to identify the relationships of substantive (written) and

common law to the organization and operation of non-public U.S. colleges and universities. Data has been compiled and analyzed to determine the extent to which each state made provision for the organization and operation of non-public institutions. The purpose of this analysis was to determine whether the powers granted in the charters justified the assumption that the state exerted increased control over non-public colleges and universities from 1636 to 1965.

Hagie, Daryl G., "The Law and Student Dismissal Procedures," *The Educational Record*, Vol. 47: no. [illegible], (1966), pp. 518-524.
This article shows some current trends and developments in the law as it applies to the relationship existing between institutions of higher education and their students. It has a high degree of emphasis on disciplinary procedures involving student dismissals. The concepts of In Loco Parentis, procedural due process and student dismissal and the aspects of who has the right to attend college are reviewed.

Harms, Herman Edward, "The Concept of In Loco Parentis in Higher Education," Florida University, Gainesville Institute of Higher Education, (June, 1970), *ERIC* ED 042 421, 34 pp.
This paper concerns itself with the challenges that In Loco Parentis is presently facing. It discusses twenty-nine cases, beginning with a case heard in a Maine court in 1847. Recent evidence from court cases shows that a semantic change in the definition of In Loco Parentis may be evolving. There appears to be a recognition of the inherent right of educational institutions to control students.

Harper, Conrad K., "The Legal Status of the Black College," *Daedalus*, Vol. 100: no. 3, (Summer, 1971), pp. 772-782.
Black colleges today and for years hence are legally defensible and largely instrumental in providing an education to students who otherwise would not be aided. Because of this, black institutes of higher education will be legally justified as racially identifiable in the future.

"High Court Upholds Housing Rules," *The Chronicle of Higher Education*, Vol. 5: no. 27, (April 12, 1971), p. 2.
The Supreme Court has affirmed the right of state colleges to require all unmarried undergraduate students to live in college dormitories.

Higher Education and National Affairs, American Council on Higher Education, Vol. 20: no. 36, Washington, D.C., (October, 1971), p. 3.
On this particular page three court cases are viewed:
(1) "Court Orders White Student's Enrollment; Appeal is Scheduled," A white student contended he was discriminated against when thirty black students with lower qualifications were selected by the University of Washington.
(2) An appeals court upheld a campus decision not to recognize a local chapter of S.D.S. as an official college organization.
(3) Pregnant teacher wins case on rights issue.

Hollister, C. A., "Constitution Goes to College: Davis vs. Board of Trustees of Arkansas A & M College," *College and University Journal*, Vol. 9: no. 1, (Winter, 1970), pp. 45-48.
State college boards of trustees and presidents may be held accountable in federal courts if found guilty of violating civil rights of faculty and staff.

Horle, Reid F., and John T. Thompson, "Legal and Political Implications of Policies Governing Admission to Publicly Supported Institutions of Higher Education," *College and University*, Vol. 43: no. 3, (Spring, 1968), pp. 774-785.
This article is concerned with admission policies of state supported institutions of higher education and their restriction and control of student body size. These actions raise some legal questions. Several issues are examined in this article: the nature of the right to attend a publicly supported institution and the legal implications of restrictive admission policies of public higher education are among them.

"Joint Statement on Rights And Freedoms of Students," *American Association of University Professors Bulletin*, No. 53, (December, 1967), pp. 365-368.

The statement was drafted jointly and later adopted by leading professional organizations, including the National Student Association of the AAUP. The preamble asserts that "freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus and in the larger community." It says that on campus students should have full freedom of inquiry, expression and association, and a defined means for participation in institutional governance. Off campus, students rights should be those of other citizens, no more and no less.

Joyce, Walter E., "A Study of the Absence of Due Process," *NASPA Journal*, Vol. 5: no. 3, (January, 1968), pp. 253-258.

This paper examines one aspect of the problem of the legal status of students in higher education today and the dismissal and suspension for disciplinary reasons. It first deals with the basic legal assumptions in discipline cases, the theories of discretion and contract, then the legal validity of procedural methods, and finally criticizes present policies and offers some proposals for change.

Kaplin, William A., "Judicial Review of Accreditation: The Parson's College Case," *Journal of Higher Education*, Vol. 40: no. 7, (October, 1969), pp. 543-554.

The Parson's College case is a landmark in the developing law of educational accreditation. Although this decision suggests that the role of the courts in the accreditation process will be a limited one, it nevertheless serves as a reminder that accreditation decisions are not immune from judicial scrutiny. The article expounds on the legal aspects and results of the case.

Knowles, Asa S., (Ed.), *Handbook of College and University Administration*, "Legal Aspects of General Administration," Vol. 1, New York, McGraw-Hill, Inc., (1970), pp. 1-85.

Recent trends stemming from problems of student unrest have resulted in a whole new body of law relating to the academic community. This volume provides a guide for administrators as to when to seek legal advice and assistance. This section is a valuable introduction to the legal aspects of higher education and its legal problems. It is divided into ten crucial categories. These cover: Legal aspects of general administration; Taxes; Legal Aspects of Mergers and Contracts; Tort Liability and insurance; Employee Relations and Unions; and Fund Raising, Contracts and other legal considerations.

Knowles, Asa S., (Ed.), *Handbook of College and University Administration*, "Legal Aspects of Academic Administration," Vol. 2, New York, McGraw-Hill, Inc., (1970), pp. 1-128.

This second volume is also an invaluable guide and introduction to the legal aspects of higher education. This section deals more directly with student and faculty relations and relative cases and court decisions. Unlike volume 1, volume 2 discusses Colleges and Universities and Discrimination; The Legal Problems in Sponsorship of Exchange Programs; Copyright; and Health Services.

Knowles, Laurence W., and W. Scott Thomas, *Historical Developments Affecting American Educational Processes*. University of Louisville School of Law, (1967), *ERIC* ED 010 268.

This study deals with the constitutional rights and responsibilities of students, teachers and school administrators. The major topics of this study include (1) Freedom of Speech and Right of Assembly, (2) Crime Investigation, (3) Religion, (4) Student Marriages, (5) Expulsion of Students. The authors have recommended that school administrators be furnished instruction in the implications of constitutional law and be provided handbooks of guidelines and recent court decisions, and that school regulations be reviewed periodically by legal counsel.

Knowles, Laurence W., "Faculty Free Speech: Old Mores Crumble Under New Legal Liberality of Recent Court Rulings," *Nation's Schools*, Vol. 85: no. 5, (May, 1970), p. 72-73.

In summary, Knowles is saying that the courts are affording new protections to free speech in education, and superintendents who attempt to regulate statements, petitions and meetings in or out of school, must meet a heavy burden of proof.

The article is primarily concerned with schools other than higher education. However, the message is the same.

Koerner, J. D., "Landmark Case is Decided: Marjorie Webster Junior College Against Middle States Association of Colleges and Secondary Schools," *Saturday Review*, Vol. 52, (September 20, 1969), p. 74.

The law suit was brought by Marjorie Webster Junior College of Washington, D.C., against the Middle States Association of Colleges and Secondary Schools, (the regional accrediting agency). The agency had in the past restricted its membership to nonprofit institutions. Thus it refused to visit, evaluate, and accredit Marjorie Webster Junior College. The decision, in favor of the College, will become a classic document in higher education.

Law and Discipline On Campus, Holmes, Grace W., (Ed.), The Institute of Continuing Education, Hutchins Hall, Ann Arbor, Michigan, (1971).

This book is centered around three general categories of law and discipline on campus. The first involves the adequacy of both the external law and the internal disciplinary system within universities. The second category of problems centers upon the adequacy of the external procedures and of the internal university machinery for handling the violations. The category is of little value except for the party interested in law enforcement and various methods of implementation. It demonstrates the role of the police, injunctive orders and intelligence gathering on campus. The third category of problems deals with the interrelationship between the external law and the internal disciplinary system. This category of problems is more directly concerned with legal aspects of colleges and universities. Chapters sixteen through nineteen center around litigation, theories of litigation, consequences of hte litigation, recent court cases, and the administrators' dilemma in taxes and insurance. Chapter seventeen concerns itself with New York University and the events that followed after the spring of 1970 and is a good example of campus litigation.

Legal Issues in Higher Education, 1960-1970, Roberts, Dayton Y., Institute of Higher Education, University of Florida, Gainesville, Florida, (1971), 36 pp.

This is a selected annotated bibliography on "*The Legal Issues in Higher Education,*" 1960-1970. The bibliography was compiled from articles in college and university law reviews and journals.

Levi, Julian, "Legal Aspects of University Governance," *Educational Record*, Vol. 50: no. 4, pp. 405-410.

In the continuing debates over governmental intervention in university and college governance, Processor Levi argues against external interference to solve campus governance problems. He takes the position, supported by legal precedents dating back to the Dartmouth College Case, that "the institution, in the preservation of its tradition and function, must be master in its own house."

Lieberman, Myron, "Get Ready to Negotiate With Nonteaching Employees," *School Management*, No. 13, (November, 1969), pp. 32-38.

Lieberman says that negotiating with nonteaching employees is as difficult as negotiating with teachers and also poses additional problems. He says "watch to the term 'nonprofessional,' to centralize administrative control in negotiations and to review every concession made to any group for potential effects on other employee groups."

Livingston, John C., "Collective Bargaining and Professionalism in Higher Education," *Educational Record*, Vol. 48, (Winter, 1967), pp. 79-88

The author has described why more and more faculty members are turning to collective bargaining to settle differences. He discusses the question of whether such conduct is unprofessional and unbecoming to a "community of scholars."

Lunsford, Terry F., The 'Free Speech' Crisis at Berkeley, 1964-1965—Some Issues for Social and Legal Research," California University, Berkeley, (1965), *ERIC* ED 011 346.

This is an examination of the issues and events of the "free speech" crises on the Berkeley campus in an attempt to provide the basis for more systematic study

of certain issues behind the student protests and to stimulate social and legal research of these issues. Restriction of expression on the Berkeley campus is dealt with.

Marmion, Harry A., "Unions and Higher Education," *Educational Record*, Vol. 49: no. 1, (Winter, 1968), pp. 41-48.
The article provides a thorough history of the problems of faculty representation and bargaining. It summarizes the stances taken by the various organizations on numerous issues involving academic personnel in higher education.

Mask, Donald J., "Student Discipline in Higher Education: A Collision Course With the Courts," *NASPA Journal*, Vol. 8: no. 3, (January, 1971), pp. 148-155.
Mask, in his article, believes that students have not been protected by the courts when colleges and universities have violated their rights under the constitution. Does a person surrender his constitutional rights when he becomes a student in an institution of higher education? In the past he did, but recent court cases indicate that this will no longer be the case. Eight cases are presented that justify that students haven't been protected. The student college relationship is presented at length as well as due process. The author feels that administrators should be concerned with three basic areas of student discipline. The first is in the area of constitutionally protected rights. The second concern is that of affording procedural due process in dismissing and suspending students for violations. The third concern is that relating to rules and regulations themselves, and how and why they are imposed.

McDonough, John, "Will Tax Reform Close Loopholes Around the Neck of Higher Education?", *College and University Business*, Vol. 47, (October, 1969), p. 32.
This article is a discussion of the recently passed tax reform bill (1970) before its final passage. It discusses the closing of existing loopholes fearfully, but says the bill as passed is not so bad. This article contains a good discussion of the "use your income" clause; and says this clause is the strongest in the bill.

McFarlane, William H., Wheeler, Charles L., *Legal and Political Issues of State Aid for Private Higher Education*, Southern Regional Education Board, Atlanta, Georgia, (1971), *ERIC* ED 052 696, 79 pp.
This report on state support for private education expands a 1969 survey of national trends prepared for the Southern Regional Education Board. It examines various legal constraints and judicial interpretations related to tax appropriations for private schools. It also examines the attitudes of Southern education and political leaders toward basic questions in this area.

McHugh, William T., "Collective Negotiations in Public Higher Education," *College and University Business*, Vol. 47, (December, 1969), p. 41.
McHugh has provided a full and comprehensive report on New York State's experience under the Taylor Law which permits collective negotiations with public employees.

Middleton, Warren C., "Academic Freedom and Tenure: Report on A Community College Investigation," *American Association of University Professors Bulletin*, Vol. 54, (Autumn, 1968), pp. 321-322.
A report of an incident in a junior college in the northwest that led to the revocation of the existing tenure policy by the Board of Trustees and the establishment of another policy under which two faculty members, who under the old policy had tenure, were dismissed. Following an investigation by an ad hoc committee of the AAUP and a subsequent threat of publication of their findings, the president of the college resigned, was succeeded by a new president who reinstated the old tenure policy and the two professors.

Mooney, Richard L., "Purchasing is Simple, But the Government's Requirements May Not Be," *College and University Business*, Vol. 46, (April, 1969), pp. 132-134.
Government provisions to be included in subcontracts involving government funds are discussed. Included in the article are subjects dealing with public policy

provisions, direct-pass on-clauses, and indicect-pass on-clauses. It suggests that purchasing personnel must become familiar with government rules. Some books and courses that explain the procedures are mentioned.

Monypenny, Phillip, "The Student As A Student," *Denver Law Journal*, Vol. 45: no. 4, (1968), pp. 649-662.

This article says that the application of constitutional limitations to student rights rests generally on the tenability of the public-private distinction. The courts' new activism in civil liberties cases may forecase more aggressive moves into higher education. Legal limits are discussed and an attempt is made to clear these up.

Murphy, William P., "Educational Freedom in the Courts," *American Association of University Professors Bulletin*, Vol. 45, (December, 1963), pp. 309-327.

Surveys for principle areas of litigation on matters of special interest to university professors are provided. The article summarizes the more significant cases and briefly indicates the legal principles and reasoning involved. It also calls attention to the outstanding legal writing in the selected areas. Included are legal protection to term contracts and tenure, due process in student dismissals, and censorship on the campus. Murphy concludes there is no settled law which makes tenure plans enforceable for public institutions unless they are included in the state constitution or statutes. For private colleges, the courts hold almost unanimously that institutional rules, bylaws, and tenure plans become part of the employment contract.

National Education Association, *The Pupil's Day In Court: Review of 1967*, Washington, D.C., (1968), *ERIC* ED 030 213.

This report contains the digests of 1967 court decisions dealing with legal and constitutional issues concerning students in public schools, parochial, and public institutions of higher education. All levels of state and federal judiciary systems are represented by the decisions. A title index to the eighty-eight cases is provided.

Ohles, John T., "A Revised Contract for College Students," *School and Society*, Vol. 98, (January, 1970), pp. 23-24.

A replacement of the present informal contract between student and university with a formal contract is advocated. A formal contract would establish financial obligations and required behavior of students. Each institution would set its own conditions and benefits to be derived before the student. There is a suggested power struggle between administrators, faculties, students, and public.

"On Hiring Communists," *Saturday Review*, Vol. 52, (December 20, 1969), pp. 64-65.

This article is concerned with the firing of Angela Davis, a philosophy teacher at the University of California at Los Angeles. The right of a Communist to teach at a public university was upheld by the Supreme Court of California.

O'Neil, Robert, "Judicial Overkill," *Change*, Vol. 2: no. 5, (1970), pp. 39-41.

O'Neil states that there is an increasing number of campus conflicts turning up in court these days. This is an examination of what rule-by-injunction could mean for the decline of academic freedom in the future. The judicial overkill will not remove the problems that disrupt and divide campuses. It is suggested that courts are becoming aware of the risks of entering the "academic thicket."

Paulsen, Monrad G., *Implications of Recent Court Decisions Involving Rights and Responsibilities on the Campus*, American Association of State Colleges and Universities, Washington, D.C., (1968), *ERIC* ED 029 603.

This paper says that at state institutions, a student is entitled to know with some specificity what the charge against him is, who is testifying, and what they are saying. He is entitled to a fair hearing, but whether he should have a lawyer has not been held by the courts. The law is not clear about the procedures required before a student can be expelled for civil disobedience off campus.

Perkins, James A., "The University and Due Process," Address presented to the 82nd meeting of New England Association of Colleges and Secondary Schools, Boston, Mass., (1967), *ERIC* ED 030 379.

This paper presents the aspects of dramatic change in the relationship between the university and its constituents. There is an increasing number of court cases challenging traditionally academic decisions. Although many courts have recognized the distinctive nature of the academic community, the danger of shifting final decision-making from campus to court remains. This paper suggests that the influx of public funds, the view of education as a social necessity, the expansion of civil rights protection and the erosion of strong disciplinary supervision by the college have made academic decisions vulnerable to judicial review.

Peterson, R. G., "College Catalog as a Contract," *Educational Record*, Vol. 51: no. 3, (Summer, 1970), pp. 260-266.
Dr. Peterson assays the law for some answers and makes some recommendations regarding institutional catalogs as a contract. He discusses at length, the legal basis of the catalog being a contract between the student and his college or university. He expounds on the courts use of contract theory to uphold the right of an institution to dismiss a student under very broadly described reasons unrelated to academic performance. The article states court decisions both pro and con to the college catalog as a contract.

Potter, Robert E., "Academic Freedom, Or Academic Entrapment? The Oliver M. Lee Case," *Phi Delta Kappan*, Vol. 50, (December, 1968), pp. 208-213.
This is the summary of an academic freedom case in which consideration for tenure was at stake. It questions whether or not faculty member, Oliver Lee, was denied tenure because of his political viewpoint. The due process procedure followed in dismissing Lee is discussed.

Rehmus, Charles M., "Collective Bargaining and the Market for Academic Personnel," *The Quarterly Review of Economics and Business*, Vol. 8, (Autumn, 1968), pp. 7-13.
The article describes two alternative models for faculty participation in decision-making. It attempts to indicate those college environments in which the new bargaining model is most likely to spring up and those on which the ground is less fertile.

"Report of Committee A, 1969-1970," *American Association of University Professors Bulletin*, No. 56, (June, 1970), pp. 153-168.
A report of the AAUP Academic Freedom and Tenure Committee as to investigations of violations of academic freedom and tenure is presented. Two new statements are provided: one classifies AAUP's position as to limitations of academic freedom because of religious or other aims of the institution and the second concerns itself with the question of "open or closed" dismissal proceedings.

"Rights of the Nontenured," *Phi Delta Kappan*, Vol. 53: no. 2, (October, 1971), p. 137.
A federal court has recently ruled that a nontenured university faculty member notified of dismissal has a right to a hearing and that the university must show reason for its action as a matter of due process. David F. Roth vs. Wisconsin State University.

Ryan, James T., "Legal and Educational Implications of Private College Newspapers," *NASPA Journal*, Vol. 8: no. 3, (January, 1971), pp. 156-159.
Almost every college in America has a newspaper, and almost every college considers it a problem. One aspect frequently viewed with apprehension is the legal relationship between the college and its newspapers. The author views the educational aspects of the problem, the legal precedent, and presents solutions.

Schier, Richard T., "Academic Freedom and Political Action," *American Association of University Professors Bulletin*, Vol. 53, (1967), pp. 231-236.
The author argues that faculty members may speak their minds politically, on the same basis as any other citizen. This is guaranteed under the freedom of speech aspect of the first amendment. His "special status" as a professor under academic freedom has nothing to do with it.

Semas, Philip W., "Leaders of Teachers" Unions Expect Gains on Campuses," *The Chronicle of Higher Education*, Vol. XXII, (September 15, 1969).

This article discusses A.F.T. President David Selden's report to the 1969 annual convention in which he lists the unions' gains in bargaining rights on college campuses across the nation.

Semas, Philip W., "Rise in Collective Bargaining Poses Philosophical Problems for Professors," *The Chronicle of Higher Education*, Vol. IV, (May 25, 1970).
In this article, Semas presents evidence for the trend toward collective bargaining for higher education in the future. He lists several unique problems faced by professors when faced with collective bargaining as opposed to problems of other employee groups.

Semas, Philip W., "Triumph Turns to Concern As Church-College Leaders Weigh Implications of Supreme Court Decisions," *The Chronicle of Higher Education*, Vol. 5: no. 37, (August 2, 1971), pp. 1 & 3.
In the case of Tilton v. Richardson, the court ruled 5-4, that federal grants for the construction of facilities at church supported colleges were constitutional. Implications in the decision are viewed.

Shea, James M., "Metamorphosis in College P. R.," *College and University Journal*, Vol. 10: no. 2, (March, 1971), pp. 4-8.
Almost any action by the university will be subject to the test of law, as students and other representatives of the new and old cultures take on traditional campus authority. The article looks at the kinds of actions being placed before the courts. Although the article is written in terms of the public relations man, it gives one a good insight into the legal implications of running a university.

Shulman, Carol H., "The Tenure Debate," *College and University Bulletin*, Vol. 24: no. 1, (October 1, 1971), pp. 3-6.
This review examines the attitudes of the supporters and critics of academic tenure. It describes a number of attempts to modify or reform the tenure system and it considers new developments in the law on nontenured, probationary teachers that may have significance in changing the tenure concept.

"Strike at University Ruled Illegal in Iowa," *The Chronicle of Higher Education*, Vol. IV, (June 8, 1970), p. 3.
The Supreme Court of Iowa has ruled that employees of the University of Northern Iowa, a state institution do not have the right to strike, that a strike against an agency of the government is illegal and against public policy, and that in the absence of specific legislation, the university's regents cannot grant exclusive bargaining rights to any group of employees.

"Summary of State Collective Bargaining Statutes Affecting Teachers," *Special Supplement, Compact*, Vol. 5: no. 1, (February, 1971), pp. 17-24.
This summary of charts classifies all existing state legislation regulating collective bargaining. It provides a rapid reference to the major features of existing state legislation.

The Colleges and Courts, 1962-1966, Chambers, M. M. (Ed.), The Interstate Printers and Publishers, Inc., Danville, Illinois, (1967).
In this book, the authors, M. M. Chambers, explores the legal aspects of higher education. This connotes a branch of social sciences dealing with the places of individuals, institutions, and agencies of education beyond the high school among the civic functions and structures of the fifty states and the federal jurisdiction, as spelled out in the opinions of the higher courts in litigated cases. His book deals with the slowly changing concepts of the rights, privileges, obligations, and responsibilities of students and teachers in this important area of concern. The entire book is beautifully written with superb cases and court decisions as evidence.

The Culture of the University: Governance and Education, The Study Commission on University Governance, University of California, Berkeley, Chapter 10, "Law in the Campus Community," Jossey-Bass Inc., San Francisco, (1968), pp. 148-172.
This chapter concerns itself with law and governance on the campus. It deals primarily with the enforcement of rules regulating student conduct. Berkeley is used as an example throughout the article.

The Junior College—And The Courts, Frankie, Richard J., Momco Printing and Publishing Company, Demascus, Maryland, (1970).

This book is concerned with the constitutional and legal history of junior colleges in America. Dr. Frankie has made an effort to summarize the pivotal facts and law as applied to selected cases during the years 1929 through 1970. The cases involve both private and public colleges. Seventeen critical court decisions involving legal questions which have helped to unravel the ambiguity and indefiniteness of various state constitutional provisions for the junior college are given as examples.

The Lexington Leader, "Federal Court Upholds Nunn Again," (Monday, October 4, 1971), Lexington, Kentucky.

This article says that the Governor of Kentucky, Louis B. Nunn, acted properly in sending units of the state police and the National Guard to the University of Kentucky campus. The court agreed both with the Governor's actions and those of the president of the university in imposing certain restrictions on mass assemblies after 5 p.m.

The Troubled Campus, Smith, Kerry G., (Ed.), Jossey-Bass Inc., 615 Montgomery St., San Francisco, (1970), Chapter 14, 'Collective Bargaining," by Alfred D. Seimberd, pp. 139-146.

Sumberg asks whether collective bargaining is appropriate in the world of higher education, and he answers that it is. He says that the collective bargaining concept—if bold and creative approaches are used—can be effectively employed by faculty members. Although he does not utilize legal implications or cases, his article provides a basic knowledge of the ramifications of collective bargaining.

"The University and Due Process," Perkins, James A., *ERIC* ED 0[illegible] 379, (December, 1967).

This address shows the aspects of the dramatic changes in the relationship between a university and its cinstituents in the increasing number of court cases challenging traditionally academic decisions. Although many courts have recognized the distinctive nature of the academic community, the danger of shifting final decision making from campus to court remains. The great influx of public funds, the strong egalitarian drive, and the expansion of civil rights protection have made academic decisions vulnerable to judicial review.

The University Crisis Reader: The Liberal University Under Attack, Wallerstein, I., and Paul Starr, (Ed.), Random House, New York, (1971), Vol. 1, pp. 40[illegible]468.

This section provides the reader with a general understanding of the numerous legal aspects and challenges to university discipline. It provides the AAUP's 1967 Joint Statement on Rights and Freedoms of Students. In addition, it gives one a modern interpretation of "in loco parentis," University Jurisdiction, Due Process, Relations of Courts and Education, and analysis of incidents and cases at Cornell and Harvard. The section is provocative in the modern legal problems of a university today.

Thomas, Ann Van Wynen and A. J. Thomas, Jr., "Private Higher Education and the Constitutions: Constitutionality of State and to Private Higher Education," Texas College and University System, Austin, (January 20, 1969), *ERIC* ED 046 534. 19 pp.

This report discusses the constitutionality of state aid to church-related institutions of higher education. Sections two and three of the paper deal with the position of the Federal Constitution and the Texas Constitution on federal and state aid on church-supported institutions.

Van Alstyne, William W., "Academic Freedom," *College Management*, (December, 1966), Vol. 12, pp. 32-35.

Van Alstyne makes some critical comments on the results of a survey of 225 colleges and universities' presidents, thirty per cent of whom disagreed completely with the AAUP proposal that students be allowed to invite and hear any speaker of their own choosing. He helped draft the proposal and so challenges the views of dissenting presidents. He notes the growing tendency of courts to strike down speaker bans on constitutional grounds. He supports the concept that the right to hear is a basic student freedom.

Watson, James E., "The Place of Controversy on the Campus," *Journal of Higher Education*, Vol. 36: no. 1, (January, 1965), pp. 18-24.

This article deals broadly with censorship and speaker bans on campuses across the nation. Problems and incidents are cited.

Whelan, C. M., "Higher Education Facilities Act in Connecticut: A Landmark Case," *Compact*, Vol. 4, no. 1, (February, 1970), pp. 49-51.

The central issue of Tilton v. Finch is the constitutionality of the participation of church-related colleges in the construction grants program of the Higher Education Facilities Act (HEFA) of 1963. When this case is decided, fundamental decisions will have been made regarding the relationship of Church, State, and education. It will be a landmark case.

"White Law Student, Charging Bias, Wins Court-Ordered Admission," *The Chronicle of Higher Education*, Vol. 6: no. 2, (October 4, 1971), p. 1.

Marco DeFunis, was denied admission to the University of Washington law school and has successfully sued the University, charging it with reverse racial discrimination.

Williams, J. D., "The University of Mississippi and the Meredith Case," University of Mississippi, (1962), *ERIC* ED 028 233.

The report is a report of the chancellor of the University of Mississippi about the University's role in the case of James Meredith. Presented is a history of the case from the university's view point, the legal suit, and the appeals. Also included are the legal injunctions and contempt proceedings instituted by Meredith, his entry on the campus, the riot which ensued, and his eventual, enrollment.

Wilson, C. H., "Tilton v. Finch: The Connecticut Colleges Case," *Liberal Education*, Vol. 56: no. 2, (May, 1970), pp. 339-348.

The Tilton Case is significant because it is the first example of a new type of litigation in the federal courts. It is a taxpayer's suit contesting the constitutional validity of a federal spending program. It is probably the most important lawsuit in higher education since the famous "Dartmouth College Case." Wilson reviews the case and states the legal theories being urged by the plaintiffs. He also deals with the implications of those legal theories for the future of American higher education.

Witmer, David R., *Right of Notice and Hearing, "Due Process" and Related Constitutional Rights of Students*, Wisconsin Board of Regents of State Universities, Madison, Wisconsin, (1969), *ERIC* ED 027 005.

Opinions about due process as it applies to the contemporary college campus range from the extreme view that due process as defined and practiced in U.S. courts of criminal law should be followed on college campuses to the opposite extreme that an educational community must evolve its own "due process" in light of campus objectives and traditions. The author reviews relevant court decisions and provides guideline approaches to the problem.

Wynn, Richard, "Collective Gaining," *Phi Delta Kappan*, Vol. 51, (April, 1970), pp. 415-419.

The author rejects the traditional labor management model of bargaining based on conflict. He proposes a collective-gaining model based on values, reason, persuasion, and ethics.

Young, D. Parker, "Due Process Standards and Guidelines for Student Discipline in Higher Education," *Journal of College Student Personnel*, Vol. 12: no. 2, (1971), pp. 102-106.

Guidelines are presented for meeting the standards of due process in disciplinary actions. Cases are used to support the guidelines and provide background.

Young, D. Parker, "Legal Considerations Concerning Public Support for Private Higher Education," *Peabody Journal of Education*, Vol. 49: no. 1, (October, 1971), pp. 60-67.

Recently, many states have studied the possibility of aiding private instituitons as a means of relieving enrollment pressures and offering educational opportunities to more students at less cost per student. Young is concerned with whether such support would be legal. He discusses the constitutionality of this idea and states recent cases dealing with the problem.

Young, D. Parker, "The Legal Aspects of Student Discipline in Higher Education," Athens Institute of Higher Education, University of Georgia, (1969), 28 pp.
This pamphlet concerns itself with the legal relationship between students and institutions of higher education, and between courts and education. In loco parentis, contractual and due process concepts in both private and public institutions are discussed. Some guidelines for disciplinary proceedings in public institutions of higher education are given. Due process is discussed at length and well presented with court cases as examples.

Young, D. Parker, *The Legal Aspects of Student Dissent and Discipline in Higher Education*, Institute of Higher Education, University of Georgia, Athens, Georgia, (1970), 65 pp.
This publication gives many court cases that have been handed down dealing with both sutdent dissent and discipline. It is a valuable aid to those concerned with higher education to better understand the legal parameters within which higher education operates and the limits to which students may carry dissent in seeking to force change. Part IV, "Relationship Between Courts and Education," provides a good definition of the courts' jurisdiction in higher education.

The Following Sources Have Been Found Unavailable for Examination (missing from stacks, etc.)

"Academic Freedom and Tenure: A Report on a Question of Notice; Westminster College Pennsylvania," *AAUP Bulletin*, Vol. 5, (June, 1965), pp. 304-309.

Drinan, R. F., "Challenge to Catholic Educators in the Maryland College Case," *NCEA Bulletin*, Vol. 63, (May, 1967), pp. 3-7.

Feld, L. G., "How Much Liability Does A College Have In Student Injury?" *College Management*, Vol. 6, (September, 1971), pp. 34-35.

Frankie, R. J., "Legal Aspects of Authorization and Control in Junior Colleges: A Summary (1936-1970)," *College and University*, Vol. 46: no. 2, (Winter, 1971), pp. 148-154.

"Hell Breaks Loose in Paradise," *Teachers College Record*, Vol. 65, (May, 1964), pp. 651-653.

Hollister, C. A., "Scope of Student Freedom," *Journal of College and University Personnel Association*, Vol. 22, (March, 1971), pp. 18-24.

"Judicial Control of Discretionary Administrative Action," *Journal of Legal Education*, Vol. 23: no. 1, (1971), pp. 63-69.

"Judicial Opinion and the Role of Teachers," *Clearing House*, Vol. 45: no. 4, (December, 1970), pp. 240-244.

Killian, J. D., "Law, the Counselor, and Student Record," *Personnel and Guidance Journal*, Vol. 48: no. 6, (February, 1970), pp. 423-432.

Lawson, H. G., "Courts and Campuses," The Wall Street Journal, (November, (1969), p. 18.

"Legal Aspects of Authorization and Control in Junior Colleges: A Summary (1936-1970)" *College and University*, Vol. 46: no. 2, (Winter, 1971), pp. 148-154.

"Legal Counseling for Students," *Journal of College Student Personnel*, Vol. 2: no. 1, (January, 1970), pp. 15-18.

"Legal Reforms As Experiments," *Journal of Legal Education*, Vol. 23: no. 1, (1971), pp. 217-239.

Legal Responsibilities of the University as a Community—The Present Status of In Loco Parentis," *Journal of American College Health Association*, Vol. 39: no. 8, (May, 1969), pp. 26-29.

Lucas, R., "Right to Higher Education," *Journal of Higher Education*, Vol. 41: no. 1, (January, 1970), pp. 55-64.

Peterson, L., "Legal Status of Teacher Personnel: Academic Freedom," R. *Educational Research*, Vol. 37, (June, 1967), pp. 299-301.

"Private Colleges Could See Themselves As Corporate Fringe Benefit," *College and University Business*, Vol. 46: no. 3, (1969), pp. 73-74.

Strickland, D. A., "In Loco Parentis—Legal Mots and Student Morals," *Journal of College Student Personnel*, Vol. 6, (1965), pp. 335-340.

"The Changing Legal Relationship Between Students and Universities," *College and University*, Vol. 45: no. 3, (Spring, 1970), pp. 245-265.

Appendix B

State of North Dakota v. North Central Association of Colleges and Secondary Schools [23 *Federal Supplement* 694 (1938)]

The State sought legal recourse to prevent the Association from withdrawing accreditation from State Agricultural College because of alleged irregularities in faculty dismissals. The governor viewed the Association's actions as unreasonable interference with the State's control of its public school system in the absence of a fair hearing.

The Association demonstrated that the State had not exhausted all recourse for hearings within the Association's framework before seeking legal action. It stated that while it was a voluntary organization, members were expected to abide by the rules and standards of the Association.

The Court ruled that membership in any voluntary organization was a privilege and not a right to be gained by force or litigation. It was also noted that the State indeed had not exhausted all possible appeals provisions within the Association's structure prior to litigation.

Parsons College v. North Central Association of Colleges and Secondary Schools [271 *Federal Supplement* 65 (1967)]

Parsons College was refused accreditation for not meeting the academic criteria set forth by the Association after a warning had been issued that the accreditation would not be granted without compliance.

The College first sought relief on grounds that its appeal to the Association's Board of Directors brought no change, thereby denying the college due process. When the Court ruled against the college, another approach was tried. Parsons sought legal recourse on the grounds that the standards were nebulous and incompresensible to men of average intellectual capacity.

The Court upheld the validity of the accreditation standards and the decision of the Association not to accredit the college. The Court asserted that such standards were guides for professional educators, not laymen, and that the public interest would be better served by comparative evaluation by peers of the college than by judicial intrusion.

Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools [302 *Federal Supplement* 459 (D.D.C. 1969)]

This case stemmed from the refusal of the Association, a voluntary accrediting association, to consider the college for accreditation because it was a profit-making organization. The school sought redress on grounds that the Association's refusal to inspect its facilities reduced the college's trade, thus violating the Sherman Anti-Trust Act.

The District Court ruled that the Association's refusal to consider the school on the basis of their non-profit criterion was arbitrary, discriminatory, and unreasonable. The Court exhorted the Association to orient their policies toward the broader welfare of society and the public interest, in view of the reliance placed upon such voluntary associations by public and government.

The decision of the District Court had great impact on the future of accreditation, despite the fact that the decision was later reversed by the Appellate Court.

Shelton College v. State Board of Education (New Jersey [263 *Atlantic Reporter* 2d 810 (1970)]

The State Board was in the process of withdrawing the approval necessary for Shelton to continue to confer B.A. degrees because Shelton had not complied with standards set forth by the Board and had been duly warned to do so. Shelton attacked the constitutionality of the statutes related to the granting of baccalaureate degrees.

The statutes required all degree-conferring colleges in the state to obtain a license and required approval of the basis and conditions for conferring the degree. Shelton claimed that this violated the First Amendment to the United States Constitution, which guarantees freedom of speech.

The Court stated that the First Amendment, to which Shelton had appealed, did not guarantee everyone an absolute right to bestow B.A. degrees upon any basis, or no basis at all. The Court saw no reason to deny the State Board power to give conditional approval to state higher educational institutions. It was also noted that the standards did not limit what Shelton could teach, but rather its power to award degrees. In short, the Court upheld the State's accreditation authority.

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